

# McDowell Rackner & Gibson PC



KATHERINE McDOWELL  
Direct (503) 595-3924  
katherine@mcd-law.com

October 5, 2015

## VIA ELECTRONIC FILING

PUC Filing Center  
Public Utility Commission of Oregon  
PO Box 1088  
Salem, OR 97308-1088

**Re: UM 1662 Portland General Electric Company and PacifiCorp d/b/a Pacific Power,  
Request for a Generic Power Cost Adjustment Mechanism Investigation.**

Attention Filing Center:

Attached for filing in the above-captioned docket is an electronic copy of Joint Reply Brief of Portland General Electric and Pacific Power.

Please contact this office with any questions.

Very truly yours,

Katherine McDowell

cc: Service List

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON  
UM 1662**

In the Matter of

PORTLAND GENERAL ELECTRIC  
COMPANY and

PACIFICORP d/b/a PACIFIC POWER,

Request for a Generic Power Cost  
Adjustment Mechanism Investigation.

**JOINT REPLY BRIEF OF  
PORTLAND GENERAL ELECTRIC AND PACIFIC POWER**

**November 2, 2015**

**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. ARGUMENT .....4

    A. Oregon Law and Policy Compels Dollar-for-Dollar Recovery of RPS Compliance Costs. ....4

        1. The Plain Language of ORS 469A.120 Provides for Full Recovery of RPS Compliance Costs. ....4

        2. The RRTM Furthers the Legislative Intent of the RPS. ....9

        3. The RRTM Advances the Policy of the RPS.....11

    B. The RRTM is the Right Mechanism to Effectuate ORS 469A.120(1).....11

        1. The RRTM is Designed to Accurately Identify and Isolate RPS Compliance Costs and Benefits. ....12

        2. The RRTM Cost Cap Will Limit the Possibility of Over-Recovery. ....13

        3. The RRTM Will Accurately Reflect PTC Variances. ....14

        4. No Earnings Test Should Apply to the RRTM.....14

        5. All Procedural Safeguards Associated with Existing Cost Recovery Mechanisms will Remain Intact. ....15

III. CONCLUSION.....16

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Pac. Coast Recovery Serv. v. Johnston</i> , 219 Or App 570 (2008).....	6
<i>State v. Stallcup</i> , 341 Or 93 (2006) .....	5
<i>Strader v. Grange Mut. Ins. Co.</i> , 179 Or App 329 (2002).....	8
<b>Oregon Revised Statutes</b>	
ORS 174.010.....	5, 6, 14
ORS 174.020.....	8
ORS 469A.120.....	<i>passim</i>
ORS 469A.180(4).....	4
ORS 756.040.....	8
ORS 757.210.....	10
ORS 757.365(10).....	15
<b>Oregon Administrative Rules</b>	
OAR 860-084-0390 .....	15
<b>Public Utility Commission of Oregon Orders</b>	
<i>In the Matter of the Application of PacifiCorp, dba Pac. Power &amp; Light Co., to Implement an Experimental Customer Choice Program in Oregon (Advice No. 98-001), Docket No. UE 105, Order No. 98-157 (Apr. 15, 1998) .....</i>	<i>16</i>
<i>In the Matter of the Application of Portland Gen. Elec. Co. for Authorization to Defer Costs Related to Implementing Senate Bill 1149 and In the Matter of the Application of PacifiCorp for Authorization to Defer Costs Related to Implementing Senate Bill 1149, Docket Nos. UM 954, UM 958, Order No. 00-165 (Mar. 17, 2000).....</i>	<i>2, 5</i>

<i>In the Matter of the Application of Portland Gen. Elec. Co. for Authorization to Defer Costs Related to Implementing Senate Bill 1149 and In the Matter of the Application of PacifiCorp for Authorization to Defer Costs Related to Implementing Senate Bill 1149,</i> Docket Nos. UM 954, UM 958, Order No. 00-308 (June 9, 2000) .....	2
<i>In the Matter of PacifiCorp, dba Pac. Power 2009 Renewable Adjustment Clause Schedule 202,</i> Docket No. UE 200, Order No. 08-548 (Nov. 14, 2008) .....	7, 14
<i>In the Matter of PacifiCorp, dba Pac. Power 2009 Transition Adjustment Mechanism Schedule 200, Cost Based-Supply Service,</i> Docket No. UE 199, Order No. 09-274 (July 16, 2009) .....	12
<i>In the Matter of PacifiCorp, dba Pac. Power 2012 Transition Adjustment Mechanism,</i> Docket No. UE 227, Order No. 11-435 (Nov. 4, 2011) .....	12
<i>In the Matter of PacifiCorp, dba Pac. Power Application for Deferred Accounting,</i> Docket No. UM 1483, Order No. 11-021 (Jan. 12, 2011) .....	15
<i>In the Matter of PacifiCorp, dba Pac. Power, Establishes Original Tariff Sheets in Schedule 8, On-Bill Repayment Pilot Program, Allowing Pass-Through Billing Agent Services as Part of the Portland Clean Energy Fund,</i> Docket No. UM 1435, Order No. 09-260 (July 7, 2009).....	16
<i>In the Matter of Portland Gen. Elec. Co. 2012 Annual Power Cost Update Tariff (Schedule 125),</i> Docket No. UE 228, Order No. 11-432 at 5 (Nov. 2, 2011).....	12
<i>In the Matter of Portland Gen. Elec. Co. Application for Deferral of Expenses Associated with a Photovoltaic Volumetric Incentive Rate Pilot,</i> Docket No. UM 1482, Order No. 11-059 (Feb. 16, 2011) .....	15
<i>In the Matter of Portland Gen. Elec. Co Application for Deferred Accounting Authorization for Certain Expenses/Revenue Refunds Associated with Senate Bill 408 and the Sale of Certain Non-Utility Assets,</i> Docket No. UM 1271, Order No. 07-421 (Sept. 26, 2007) .....	8
<i>In the Matter of Portland Gen. Elec. Co. Application for Deferred Accounting of Revenues and Expenses Associated with a Residential Critical Peak Pricing Pilot,</i> Docket No. UM 1427, Order No. 09-395 (Oct. 2, 2009) .....	16

<i>In the Matter of Portland Gen. Elec. Co. Offer of Optional Demand Response Pilot Program to Large Nonresidential Customers,</i> Docket No. UE 205, Order No. 09-254 (July 6, 2009).....	16
<i>In the Matter of Portland Gen. Elec. Co. Request for Net Variable Power Cost Revision,,</i> Docket No. UE 198, Order No. 08-505 (Oct. 21, 2008).....	12
<i>In the Matter of Portland Gen. Elec. Co., Renewable Resources Automatic Adjustment Clause, Revises Schedule 122,</i> Docket No. UE 288, Order No. 15-129 (Apr. 15, 2015) .....	14
<i>In the Matter of Pub. Util. Comm'n of Or. Investigation into Pilot Programs to Demonstrate the Use and Effectiveness of Volumetric Incentive Rates for Solar Photovoltaic Energy Systems,</i> Docket No. UM 1452, Order No. 10-198 (May 28, 2010).....	2, 5, 15
<i>In the Matter of Pub. Util. Comm'n of Or. Investigation of Automatic Adjustment Clause Pursuant to SB 838,</i> Docket No. UM 1330, Order No. 07-572 (Dec. 19, 2007).....	15
<i>In the Matter of Revised Tariff Schedules in Or. filed by PacifiCorp, dba Pac. Power &amp; Light Co.,</i> Docket No. UE 94, Order No. 96-175 (July 10, 1996).....	16

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UM 1662**

In the Matter of  
PORTLAND GENERAL ELECTRIC  
COMPANY and  
PACIFICORP d/b/a PACIFIC POWER,  
Request for a Generic Power Cost Adjustment  
Mechanism Investigation

**JOINT REPLY BRIEF OF  
PORTLAND GENERAL ELECTRIC  
AND PACIFIC POWER**

**I. INTRODUCTION**

Portland General Electric Company (PGE) and PacifiCorp d/b/a Pacific Power (Pacific Power), collectively referred to as the Joint Utilities, respectfully submit this Joint Reply Brief to the Public Utility Commission of Oregon (Commission), in accordance with Administrative Law Judge Patrick Power’s ruling issued on September 23, 2015. This proceeding addresses the Joint Utilities’ proposal for a new mechanism, the renewable resources tracking mechanism (RRTM), to address cost recovery for variances in net power costs (NPC) and production tax credits (PTC) related to compliance with Oregon’s Renewable Portfolio Standard (RPS), enacted through Senate Bill (SB) 838 and codified in ORS Chapter 469A.

The Joint Utilities agree with CUB’s characterization of the fundamental questions in this proceeding:

- (1) Is dollar-for-dollar recovery of variable RPS compliance costs compelled by Oregon law or policy?

1 (2) Is the RRTM the appropriate mechanism to achieve the applicable law and  
2 policy objectives of the RPS?<sup>1</sup>

3 The answer to both of these questions is yes.

4 First, Oregon law and policy support dollar-for-dollar recovery of RPS compliance  
5 costs. The plain language of the RPS provides for recovery in rates of all prudently incurred  
6 costs related to RPS compliance.<sup>2</sup> ORS 469A.120(1) gives the Commission discretion to  
7 determine the method and timing of cost recovery, but does not allow the Commission to  
8 provide less than 100 percent cost recovery. The existing cost recovery mechanisms, PGE’s  
9 and Pacific Power’s annual NPC updates and power cost adjustment mechanisms (PCAM),  
10 indisputably disallow prudent RPS compliance costs.<sup>3</sup>

11 The parties have offered selected excerpts from SB 838’s legislative history to  
12 support their opposition to the RRTM. The legislative history as a whole, however, indicates  
13 that the legislature intended that utilities recover their compliance costs and be held harmless  
14 from the costs and risks of SB 838 implementation.

15 The RRTM is directly supported by existing precedent in which the Commission  
16 provided dollar-for-dollar cost recovery to utilities under provisions nearly identical to ORS  
17 469A.120(1).<sup>4</sup> The Commission has never disregarded an express cost recovery provision

---

<sup>1</sup> CUB’s Opening Brief at 1.

<sup>2</sup> ORS 469A.120(1).

<sup>3</sup> Joint Utilities’ Opening Brief at 5; PGE-PAC/200, Tinker-Dickman/8.

<sup>4</sup> See, e.g., *In the Matter of the Application of Portland Gen. Elec. Co. for Authorization to Defer Costs Related to Implementing Senate Bill 1149 and In the Matter of the Application of PacifiCorp for Authorization to Defer Costs Related to Implementing Senate Bill 1149*, Docket Nos. UM 954, UM 958, Order No. 00-165 at 2-4 (Mar. 17, 2000); *reconsideration denied* Order No. 00-308 (June 9, 2000) (applying cost recovery language providing “the electric company the opportunity to recover all costs prudently incurred” to authorize dollar-for-dollar recovery of SB 1149 implementation costs); *In the Matter of Pub. Util. Comm’n of Or. Investigation into Pilot Programs to Demonstrate the Use and Effectiveness of Volumetric Incentive Rates for Solar Photovoltaic Energy Systems*, Docket No. UM 1452, Order No. 10-198 at 21 (May 28, 2010) (in the context of solar volumetric rate pilot program, applying cost recovery language providing that “[a]ll prudently incurred costs associated with compliance with this section are recoverable in the rates of an electric company” to authorize dollar-for-dollar cost recovery).



1 for specific types of implementation costs, which is the effect of the parties' positions in this  
2 case.

3           Second, the RRTM is the appropriate mechanism to achieve the law and policy  
4 objectives of the RPS. Following eight years of incomplete RPS compliance cost recovery,  
5 the Joint Utilities carefully crafted the RRTM to identify and isolate RPS variable  
6 compliance costs and benefits. By comparing forecast generation and forecast market prices  
7 with actual generation and actual market prices, the RRTM determines the actual costs of  
8 RPS compliance and provides a mechanism for timely recovery of those costs. The RRTM  
9 also trues-up variances in forecast and actual PTCs, which is increasingly important as  
10 current PTCs in rates reach the end of their ten-year life. The RRTM effectuates ORS  
11 469A.120, which was designed to encourage implementation of the RPS by providing full  
12 and accurate recovery of the costs of RPS compliance.

13           The RRTM will not limit or change prudence reviews of RPS compliance costs, nor  
14 will it interfere with the operation of existing NPC recovery mechanisms. All current  
15 procedural safeguards will remain in place and parties will have an opportunity to review and  
16 audit RRTM filings. The Commission will ultimately evaluate and determine the prudence  
17 of the costs included in the RRTM. To address concerns regarding design and operation of  
18 the RRTM, the Joint Utilities have proposed review of the RRTM after three years so that  
19 improvements or modifications may be made if necessary.

1 **II. ARGUMENT**

2 **A. Oregon Law and Policy Compels Dollar-for-Dollar Recovery of RPS**  
3 **Compliance Costs.**

4 **1. The Plain Language of ORS 469A.120 Provides for Full Recovery of RPS**  
5 **Compliance Costs.**

6 Staff claims that the legislature “did not curtail the Commission’s ratemaking  
7 authority over RPS-related [net variable power costs (NVPC)], but left the ratemaking  
8 treatment of RPS-related NVPC *wholly* to the Commission’s discretion.”<sup>5</sup> While the Joint  
9 Utilities agree that the Commission has discretion over the design and timing of RPS  
10 compliance cost recovery, the Commission does not have discretion to adopt a mechanism  
11 that directly or indirectly precludes recovery of prudently incurred RPS compliance costs.  
12 All parties concede that the Commission’s current cost recovery model results in just such a  
13 disallowance.<sup>6</sup>

14 Where the legislature intended to grant the Commission discretion to partially  
15 disallow compliance costs, it did so explicitly. For alternative compliance payments under  
16 ORS 469A.180(4), the legislature authorized the Commission to “determine for each electric  
17 company the extent to which alternative compliance payments may be recovered in the rates  
18 of the company.”<sup>7</sup> This is the only exception to the legislature’s mandate to provide recovery  
19 of all prudently incurred costs under ORS 469A.120(1). The parties’ argument here is that  
20 ORS 469A.120(1) implicitly gives the Commission the same discretion to partially disallow  
21 compliance costs that ORS 469A.180(4) explicitly provides. This interpretation conflates

---

<sup>5</sup> Staff’s Opening Brief at 1 (emphasis added). ICNU makes similar claims. See ICNU’s Opening Brief at 4-5.

<sup>6</sup> Staff’s Prehearing Brief at 6; CUB’s Prehearing Brief at 8; ICNU’s Prehearing Brief at 8.

<sup>7</sup> ORS 469A.180(4).

1 distinct cost recovery language in the two statutes and violates the principle that where the  
2 legislature used different terms, it necessarily intended different meanings.<sup>8</sup>

3 CUB disputes the Joint Utilities’ interpretation of the significance of ORS  
4 469A.120(1) specifying in detail the types of costs recoverable. CUB argues that the Joint  
5 Utilities’ interpretation improperly adds “dollar-for-dollar recovery” into the statute in  
6 violation of ORS 174.010, which provides that construction of statute should not “insert what  
7 has been omitted.”<sup>9</sup> To the contrary, the Joint Utilities are not adding a new term into the  
8 statute; instead they are interpreting the existing statutory language. It is entirely reasonable  
9 to read the provision of “all prudently incurred costs” are recoverable in rates as being  
10 synonymous with “dollar-for-dollar” recovery. This reading of the statute is consistent with  
11 the Commission’s previous treatment of similar statutory cost recovery language.<sup>10</sup>

12 CUB’s interpretation negates ORS 469A.120(1) by failing to give effect to the  
13 language “all prudently incurred costs associated with compliance with a renewable portfolio  
14 standard are recoverable in the rates of an electric company.” CUB’s interpretation would  
15 “omit what has been inserted” by the legislature, in contravention of ORS 174.010.<sup>11</sup> CUB  
16 thus applies the wrong provision of ORS 174.010—in this case, the applicable provision is  
17 that the construction of a statute should not “omit what has been inserted.”

---

<sup>8</sup> See *State v. Stallcup*, 341 Or 93, 99–101 (2006) (relying on legislature’s use of different terms within statute as suggesting legislature intended those terms to carry different meanings).

<sup>9</sup> CUB’s Opening Brief at 5.

<sup>10</sup> See, e.g., Order No. 00-165 at 2-4 (applying cost recovery language providing “the electric company an opportunity to recover all costs prudently incurred” to authorize dollar-for-dollar recovery of SB 1149 implementation costs); Order No. 10-198 at 21 (in the context of solar volumetric rate pilot program, applying cost recovery language providing that “[a]ll prudently incurred costs associated with compliance with this section are recoverable in the rates of an electric company” to authorize dollar-for-dollar cost recovery).

<sup>11</sup> ORS 174.010 (“In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.”)

1 ICNU and CUB argue that ORS 469A.120(1), read in the context of ORS  
2 469A.120(2), suggests a legislative intent that dollar-for-dollar recovery be applied only to  
3 capital costs. This argument is unpersuasive. ORS 469A.120(2) specifies the mechanism  
4 and timing for recovery for a subset of RPS compliance costs, but does not alter the  
5 legislative authorization for recovery of 100 percent of all prudently incurred RPS  
6 compliance costs under both subsections (1) and (2). Subsection (2) in no way limits the  
7 Commission’s discretion to consider the appropriate timing and mechanism for recovery of  
8 costs under subsection (1) and to approve the RRTM. ICNU’s and CUB’s contextual  
9 analysis would render the cost recovery provided in ORS 469A.120(1) a nullity, contrary to  
10 basic tenets of statutory construction.<sup>12</sup>

11 ICNU posits that the reason why specific types of costs are enumerated in ORS  
12 469A.120(1) is that “the intent of this statutory provision was not to ensure 100 percent  
13 recovery” of those costs, but instead to prevent disallowance because the RPS compliance  
14 costs do not comply with traditional least-cost planning.<sup>13</sup> Without any support from the  
15 legislative history of SB 838, ICNU reorders the words of the statute to provide that “all  
16 prudently incurred costs are recoverable in rates even if the costs are above-market.” Under  
17 ICNU’s interpretation, the phrase “above-market costs” modifies all other costs listed in the  
18 statute. This is contrary to the statute’s actual wording, which places “above-market costs”

---

<sup>12</sup> ORS 174.010 provides that “where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.” *See also Pac. Coast Recovery Serv. v. Johnston*, 219 Or App 570, 576–577 (2008) (refusing to adopt interpretation that would render statutory provision a nullity).

<sup>13</sup> ICNU’s Opening Brief at 3.

1 as an item in a list among other types of costs.<sup>14</sup> The more logical reading of the statute is  
2 that the Joint Utilities may recover all costs, including “above-market costs.”

3 Staff and ICNU cite Order No. 08-548 for the proposition ORS 469A.120(1) “did not  
4 make new law,” and that RPS compliance costs should be treated like all other utility costs.<sup>15</sup>  
5 First, Section 13(1) of SB 838 *did* make new law. As noted by ICNU, ORS 469A.120(1)  
6 explicitly recognized an exception from least-cost planning principles and specifically  
7 enumerated the types of RPS compliance costs to be granted full recovery in utility rates.

8 Second, Staff and ICNU make too much of the dicta in Order No. 08-548. The  
9 Commission did not declare in Order No. 08-548 that it would treat variances in ORS  
10 469A.120(1) costs just like all other NPC. The focus of Order No. 08-548 was on the  
11 prudence of certain capital costs under Pacific Power’s renewable adjustment clause (RAC),  
12 and not recoverability of ORS 469A.120(1) costs.<sup>16</sup> In the discussion quoted by Staff and  
13 ICNU, the major point of law subsequently analyzed by the Commission is that SB 838 did  
14 not lower or otherwise change the applicable prudence standard.<sup>17</sup>

15 Third, by asserting that ORS 469A.120(1) merely reaffirms the Joint Utilities’  
16 preexisting opportunity to recover prudent costs, the parties effectively argue that the  
17 controlling statute is ORS 756.040, the Commission’s general ratemaking statute. This is

---

<sup>14</sup> ORS 469A.120(1) (“interconnection costs, costs associated with using physical or financial assets to integrate, firm or shape renewable energy sources on a firm annual basis to meet retail electricity needs, above-market costs and other costs associated with transmission and delivery of qualifying electricity to retail electricity consumers.”).

<sup>15</sup> Staff’s Opening Brief at 3 (*citing* Order No. 08-548, “Section 13 of the Act provides that ‘all prudently incurred costs associated with compliance with a renewable portfolio standard are recoverable in the rates of an electric utility.’ In this regard SB 838 does not make ‘new’ law. Prudently incurred costs always have been recoverable in rates. The ‘new’ feature of SB 838 (in terms of ratemaking) is its endorsement of the adjustment clause (or another method for timely recovery of costs) as the vehicle for a utility to recover its prudently incurred costs [to construct new resources], pending its next general rate case.”); ICNU’s Opening Brief at 3-4.

<sup>16</sup> *In the Matter of PacifiCorp, dba Pac. Power 2009 Renewable Adjustment Clause Schedule 202*, Docket No. UE 200, Order No. 08-548 at 2 (Nov. 14, 2008).

<sup>17</sup> *Id.* at 18-22.

1 contrary to basic principles of statutory construction, which require that “[w]hen a general  
2 and particular provision are inconsistent, the . . . particular intent controls a general intent  
3 that is inconsistent with the particular intent.”<sup>18</sup> ORS 469A.120(1) is both inconsistent with  
4 ORS 756.040 and more particular than ORS 756.040. Thus, to the extent the Commission’s  
5 general ratemaking authority and balancing of customer and shareholder interests under ORS  
6 756.040 would impede full recovery of RPS compliance costs, the mandate for full cost  
7 recovery in ORS 469A.120(1) is controlling. Moreover, because the RPS is a later-enacted  
8 statute, ORS 469A.120(1) amends ORS 756.040 for this subset of costs to the extent the  
9 statutes are inconsistent.<sup>19</sup>

10 ICNU claims that this case hinges on the definition of “recoverable,” and that the  
11 RRTM is unnecessary because the Joint Utilities already have an adequate opportunity for  
12 recovery.<sup>20</sup> ICNU incorrectly concludes that RPS compliance cost variances are  
13 “recoverable” through the PCAM, when in fact RPS compliance costs are more accurately  
14 characterized as “at-risk.” For example, if expenses are “recoverable” per the terms of a  
15 contract, the party that incurred the expenses is entitled to reimbursement as long as the  
16 expenses fall within the terms of that contract. In contrast, the variance between actual and  
17 forecast RPS compliance costs is currently at-risk under the PCAM because recovery is  
18 discounted or, in many cases, totally disallowed.

---

<sup>18</sup> ORS 174.020(2); *Strader v. Grange Mut. Ins. Co.*, 179 Or App 329, 337–338 (2002) (when a general provision and a particular provision are irreconcilable, “the specific statute is considered an exception to the general one.”).

<sup>19</sup> See *In the Matter of Portland Gen. Elec. Co Deferred Accounting Authorization for Certain Expenses/Revenue Refunds Associated with Senate Bill 408 and the Sale of Certain Non-Utility Assets*, Docket No. UM 1271, Order No. 07-421 at 7 (Sept. 26, 2007) (citing *Ware v. Hall*, 342 Or 444, 452 (2007)) (“When statutes conflict, the later-enacted, more specific statute controls.”).

<sup>20</sup> ICNU’s Opening Brief at 1.

1 ICNU further claims that PGE has been over-recovering NPC and Pacific Power’s  
2 earnings have been adequate to withstand under-recovery of NPC.<sup>21</sup> ICNU’s argument is  
3 that PGE’s and Pacific Power’s overall financial performance should subsidize RPS  
4 compliance; this is contrary to ORS 469A.120(1).

5 **2. The RRTM Furthers the Legislative Intent of the RPS.**

6 CUB mistakenly asserts that “the Joint Utilities do not contest that there is nothing in  
7 the legislative history of ORS 469A.120 that demonstrates a legislative intent to *require*  
8 dollar-for-dollar recovery of costs recovered pursuant to subsection (1).”<sup>22</sup> The Joint Utilities  
9 *do* contest this statement. The legislative history demonstrates that proponents of SB 838  
10 intended to keep utilities whole<sup>23</sup> by providing cost recovery for compliance with the RPS’s  
11 mandate to invest in specific resources.<sup>24</sup>

12 Staff and ICNU cite oral testimony provided by Mark Nelson regarding the A-  
13 Engrossed version of SB 838, and imply that the legislature had originally intended to create  
14 an automatic adjustment clause (AAC)<sup>25</sup> for all RPS compliance costs and then changed  
15 course based on the testimony of ICNU’s lobbyist.<sup>26</sup> The testimony does not support this

---

<sup>21</sup> *Id.* at 9.

<sup>22</sup> CUB’s Opening Brief at 5 (emphasis in original).

<sup>23</sup> “[I]n preparation for today, I re-read the bill and I discovered something. What I discovered was that this is a very good bill. It is comprehensive but it is concise. It establishes a clear path to success, but it contains significant flexibilities to achieve that success. It is good for the environment, it is good for consumers, and it does no harm to the utilities.” House Committee on Energy and Environment, SB 838, Apr. 16, 2007, audio recording at approximately 59 minutes (oral testimony of Jason Eisdorfer, Citizens’ Utility Board of Oregon).

<sup>24</sup> “It actually makes some sense, if you’re asking the utilities to make an investment, a specific investment, and they’re saying ok, if we have to make that to meet law, we want to make sure that we have the opportunity to recover those costs if they are prudently incurred. And I think that makes some sense.” House Committee on Energy and Environment, SB 838, Apr. 16, 2007, audio recording at approximately 1 hour, 25 minutes (oral testimony of Lee Beyer, Chair of the Public Utility Commission of Oregon).

<sup>25</sup> Throughout this brief, “AAC” is used to refer to the generic language in the ORS 469A.120 directing the Commission to adopt an automatic adjustment clause, and “RAC” is used to refer to the renewable adjustment clause adopted by the Commission to implement the legislature’s direction in the statute.

<sup>26</sup> Staff’s Opening Brief at 5-6; ICNU’s Opening Brief at 5-6. ICNU’s Opening Brief cites Docket No. UE 283, Exhibit 1102. Exhibit 1102 is an inaccurate summary of legislative history to which the Joint Utilities objected when Staff proposed to offer it as an exhibit in this case. As a result, Staff did not offer the exhibit and it is not

1 theory and even Staff acknowledges that the testimony is of questionable probative value.<sup>27</sup>  
2 To be clear, the testimony refers only to Section 13a of SB 838, which required expedited  
3 approval of the AAC.<sup>28</sup> The A-Engrossed version of SB 838 mistakenly referred to Section  
4 13(1) rather than 13(3). The change in the bill from the A-Engrossed version to the enrolled  
5 version corrects this typographical error, so that the Commission was required to expedite  
6 adoption of a cost recovery mechanism under section 13(3), but not under section 13(1).<sup>29</sup>  
7 The testimony and the change in the language of Section 13a address only the timing of  
8 Commission action.

9 CUB and ICNU both refer to then Commission Chair Lee Beyer's testimony which is  
10 included in ICNU's Exhibit 301: "The utility will have to file a general rate case under ORS  
11 757.210 to seek recovery of other costs that do not qualify for recovery under an automatic  
12 adjustment clause."<sup>30</sup> But if this testimony is actually interpreted in the manner argued, it  
13 would mean that the Commission has violated the RPS for the last eight years by allowing  
14 variable compliance costs to be recovered through annual NPC updates and PCAMs. CUB's  
15 testimony in the legislative process made clear that these NPC mechanisms, and not a general  
16 rate case, would be used to recover variable compliance costs.<sup>31</sup>

---

a part of the record in this case. Given this background, ICNU's reliance on and citation of this exhibit is improper and the Commission should not consider it.

<sup>27</sup> Staff's Opening Brief at 7.

<sup>28</sup> Section 13a of the A-Enrolled version of SB 838 provides: The Public Utility Commission shall establish the automatic adjustment clause or another method for timely recovery of costs as required by section 13 of this 2007 Act no later than January 1, 2008. To the extent the use of an automatic adjustment clause or other method for timely recovery of costs by an electric company is approved by the commission, the clause or method shall apply to all prudently incurred costs described in section 13 (1) of this 2007 Act incurred by an electric company since the date of the company's last general rate case that was decided by the commission before the effective date of this 2007 Act.

<sup>29</sup> House Committee on Energy and Environment, SB 838, Apr. 18, 2007, audio recording at approximately 1 hour, 28 minutes (oral testimony of Brent Gale, PacifiCorp).

<sup>30</sup> CUB's Opening Brief at 6; ICNU's Opening Brief at 8.

<sup>31</sup> PGE-PAC/300 ("as a renewable resource comes on line, the utility's variable costs, or costs of fuel, go down and those savings will be passed on to the customer through annual rate adjustment that are currently in place.")



1           **3.       The RRTM Advances the Policy of the RPS.**

2           Staff disagrees that the RPS makes a “promise” to the utilities that they would recover  
3 their RPS compliance costs.<sup>32</sup> CUB also disagrees that the policy of the RPS is to encourage  
4 a transition away from fossil fuels, because “utilities are legally required to comply  
5 regardless of how variable costs of compliance are recovered.”<sup>33</sup>

6           SB 838 was negotiated with substantial stakeholder involvement, including utility  
7 involvement, and the cost recovery provision in SB 838 was designed to secure utility  
8 support for the bill. Failure to fully implement the cost recovery provision undermines the  
9 balance of interests struck by the legislature to ensure SB 838’s long-term durability. The  
10 Commission should promote the policy underlying the RPS by making renewable resources a  
11 cost-neutral choice for the Joint Utilities.<sup>34</sup>

12       **B.       The RRTM is the Right Mechanism to Effectuate ORS 469A.120(1).**

13           Staff, CUB, and ICNU urge the Commission to reject the RRTM based on alleged  
14 design flaws. The Joint Utilities have addressed each of the parties’ concerns. If  
15 implementation of the RRTM reveals that modification is necessary, however, the Joint  
16 Utilities have proposed a defined schedule for review of the RRTM to provide an opportunity  
17 for refinement.

---

<sup>32</sup> Staff’s Opening Brief at 3.

<sup>33</sup> CUB’s Opening Brief at 7.

<sup>34</sup> In CUB’s Opening Brief, CUB misstates the Joint Utilities’ position on cost neutrality, claiming that the Joint Utilities selectively identify favorable PCAM design criteria. CUB’s Opening Brief at 8, note 27. CUB misreads the Joint Utilities’ statement. The Joint Utilities stated that development of RPS resources should be cost neutral – meaning no additional costs to the utilities. This statement was not an endorsement of the PCAM design principle of revenue neutrality. In fact, the Joint Utilities further explained in their Opening Brief that the principle of revenue neutrality was inherently in conflict with ORS 469A.120(1)’s cost recovery language. Joint Utilities’ Opening Brief at 5.

1           **1.       The RRTM is Designed to Accurately Identify and Isolate RPS**  
2           **Compliance Costs and Benefits.**

3           The parties express concern that using market price to determine actual costs of RPS  
4 compliance will shift market price risk to customers and may result in surcharges based on  
5 market price fluctuations.<sup>35</sup> Determining the variance between forecasted and actual costs of  
6 RPS compliance is an essential function of the RRTM. To the extent that forecasted costs  
7 differ from actual costs, the Joint Utilities are absorbing those cost variances. The actual  
8 costs of RPS compliance cannot be determined without establishing the value of the energy  
9 generated by RPS-compliant resources. The Joint Utilities have shown that using market  
10 prices to establish the value of energy is common practice.

11           Staff also suggests in a footnote that the RRTM may create a perverse incentive for  
12 utilities to poorly forecast the market.<sup>36</sup> This comment ignores the fact that the forward price  
13 curves used by the Joint Utilities in their annual NPC updates are well-established and  
14 auditable.<sup>37</sup>

15           ICNU claims that the RRTM’s calculation of RPS-related power cost recovery “bears  
16 no relation to the Joint Utilities’ total power cost recovery,” pointing to Pacific Power’s  
17 historical wind variances and overall NPC under-recovery and PGE’s RPS-related NPC

---

<sup>35</sup> Staff’s Opening Brief at 11; CUB’s Opening Brief at 10-11; ICNU’s Opening Brief at 11-12.

<sup>36</sup> Staff’s Opening Brief at 8, note 22.

<sup>37</sup> See *In the Matter of PacifiCorp, dba Pac. Power 2012 Transition Adjustment Mechanism*, Docket No. UE 227, Order No. 11-435 at 17-18 (Nov. 4, 2011) (approving Pacific Power’s use of an internally generated forward price curve over ICNU’s objections); *In the Matter of PacifiCorp, dba Pac. Power 2009 Transition Adjustment Mechanism Schedule 200, Cost Based-Supply Service*, Docket No. UE 199, Order No. 09-274, App. A at 19 (July 16, 2009) (under the Transition Adjustment Mechanism Guidelines, Pacific Power is required to provide the risk management validation for the final update that shows how the official FPC compares to broker quotes); *In the Matter of Portland Gen. Elec. Co. Request for Net Variable Power Cost Revision*, Docket No. UE 198, Order No. 08-505, App. A at 12 (Oct. 21, 2008) (directing PGE to provide forward curve inputs as part of PGE’s AUT filing process); *In the Matter of Portland Gen. Elec. Co. 2012 Annual Power Cost Update Tariff (Schedule 125)*, Docket No. UE 228, Order No. 11-432 at 5 (Nov. 2, 2011) (affirming that PGE will continue to use internal forward curves in projecting power costs, and that these forward curves will be provided to parties upon request).

1 variances and recovery of overall NPC.<sup>38</sup> With respect to Pacific Power, ICNU’s assertion is  
2 based on an apples to oranges comparison of total-company wind variance with Oregon-  
3 allocated NPC under-recovery.<sup>39</sup> Adjusting ICNU’s analysis to correctly compare both  
4 numbers on an Oregon-allocated basis, Pacific Power’s average wind variance in the RRTM  
5 is approximately \$7.9 million, and its Oregon-allocated average NPC under-recovery is \$26  
6 million. Thus, contrary to ICNU’s claims, Pacific Power’s RPS-related under-recovery has  
7 historically been less than its overall NPC under-recovery. With respect to PGE, ICNU  
8 claims that “the RRTM would show an under-recovery of RPS-related NPC for PGE every  
9 year between 2009 and 2013 – up to a \$24 million deficit – despite the fact that the utility  
10 over-recovered its total NPC in all but two of those years.”<sup>40</sup> ICNU implies that the RRTM  
11 will allow additional recovery even if the utility has over-collected NPC, and ignores the  
12 RRTM’s cost cap. In the years in which PGE over-recovered its total NPC, no additional  
13 recovery through the RRTM would have been available. The RRTM is appropriately  
14 designed to capture RPS-compliant resources as a portion of overall power cost recovery.

15 **2. The RRTM Cost Cap Will Limit the Possibility of Over-Recovery.**

16 CUB is confused about the operation of the RRTM cost cap, and queries “[w]hich  
17 part of NPC are the Joint Utilities proposing to cap?”<sup>41</sup> To be clear, the Joint Utilities  
18 propose capping the RRTM to preclude recovery or refund of RPS compliance costs above or  
19 below actual NPC.<sup>42</sup> CUB also asks if the Joint Utilities will “decline an RRTM adjustment  
20 when the PCAM reflects that they have over-recovered NPC?”<sup>43</sup> In the event the RRTM

---

<sup>38</sup> ICNU’s Opening Brief at 10-11.

<sup>39</sup> *Id.* ICNU compares Pacific Power’s total-company wind variance (average of \$31.6 million for 2007 to 2013) to Oregon-allocated NPC under-recovery (average of less than \$30 million for 2007 to 2013).

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

<sup>41</sup> CUB’s Opening Brief at 11.

<sup>42</sup> PGE-PAC/200, Tinker-Dickman/11-12.

<sup>43</sup> CUB’s Opening Brief at 12.

1 resulted in additional recovery of RPS compliance costs, the answer is “yes.” However, in  
2 the more likely scenario where the RRTM would result in a refund to customers, the Joint  
3 Utilities will refund customers the excess RRTM benefits above actual NPC.

4 **3. The RRTM Will Accurately Reflect PTC Variances.**

5 Staff and ICNU allege that including variances in PTCs in the RRTM will create  
6 asymmetry if the corresponding adjustments are not also made to accumulated deferred  
7 income tax (ADIT).<sup>44</sup> As explained in the Joint Utilities’ Opening Brief, Pacific Power’s  
8 ADIT reflects no PTCs and PGE has agreed to offset ADIT changes from RRTM recovery.<sup>45</sup>

9 PTCs are a readily quantifiable RPS compliance benefit, and forecasted PTCs are  
10 included in the Joint Utilities’ RACs.<sup>46</sup> To the extent actual production differs from the  
11 forecast, there are real benefits or costs that the Joint Utilities are currently absorbing. In  
12 addition, because PTCs expire after 10 years, the RRTM provides a needed mechanism to  
13 reflect the cessation of existing PTCs in rates outside of a general rate case.<sup>47</sup>

14 **4. No Earnings Test Should Apply to the RRTM.**

15 Staff, CUB, and ICNU urge that if the Commission approves the RRTM, it should be  
16 subject to an earnings test.<sup>48</sup> The legislature did not provide for an earnings test in ORS  
17 469A.120, and there is no reason to insert into the statute what the legislature has omitted.<sup>49</sup>

---

<sup>44</sup> Staff’s Opening Brief at 11; ICNU’s Opening Brief at 15.

<sup>45</sup> Joint Utilities’ Opening Brief at 11.

<sup>46</sup> See, e.g., Order No. 08-548 at 4 (“The benefits of the federal production tax credits are accounted for in this RAC proceeding.”); *In the Matter of Portland Gen. Elec. Co., Renewable Resources Automatic Adjustment Clause, Revises Schedule 122*, Docket No. UE 288, Order No. 15-129 (Apr. 15, 2015).

<sup>47</sup> Because the RAC includes the PTC benefits of new RPS-compliant generation, it is possible that the RAC could also be used to account for expiration of PTCs. Because the Commission has not previously considered this issue, the Joint Utilities have proposed to include changes in PTCs in the RRTM, irrespective of whether the Commission approves the RRTM to cover NPC-related compliance cost variances.

<sup>48</sup> Staff’s Opening Brief at 12; CUB’s Opening Brief at 11; ICNU’s Opening Brief at 13-14.

<sup>49</sup> ORS 174.010.

1 ICNU asserts that there is no earnings test for the RAC because AACs are generally  
2 exempt from earnings tests.<sup>50</sup> The RAC implemented the direction of the legislature to  
3 establish an AAC or “another method” for cost recovery of capital costs.<sup>51</sup> In adoption of the  
4 RAC, the parties agreed in the Stipulation to support the use of deferred accounting, and that  
5 deferrals under the RAC would not be subject to an earnings test.<sup>52</sup> The Commission  
6 approved the Stipulation, including the use of deferred accounting and that no earnings test  
7 would apply to deferrals.<sup>53</sup> To the extent that the Commission had discretion to adopt  
8 “another method,” arguably it could have adopted a different method subject to an earnings  
9 test. But it did not, because applying an earnings test would not effectuate the policy of the  
10 RPS. Moreover, even where the statutory cost recovery provision does not prescribe an  
11 AAC, the Commission has approved dollar-for-dollar recovery with no earnings test.<sup>54</sup>

12 **5. All Procedural Safeguards Associated with Existing Cost Recovery**  
13 **Mechanisms will Remain Intact.**

14 CUB and ICNU express concern regarding the Joint Utilities’ proposal for review of  
15 the RRTM following three years of implementation. CUB urges the Commission not to be  
16 “tempted” by the proposal,<sup>55</sup> and ICNU calls the proposal “a Trojan horse.”<sup>56</sup> The  
17 Commission has a long tradition of incrementally implementing major policy decisions,

---

<sup>50</sup> ICNU’s Opening Brief at 14.

<sup>51</sup> SB 838, Section 13a.

<sup>52</sup> *In the Matter of Pub. Util. Comm’n of Or. Investigation of Automatic Adjustment Clause Pursuant to SB 838*, Docket No. UM 1330, Order No. 07-572, App. A at 6 (Dec. 19, 2007).

<sup>53</sup> Order No. 07-572 at 4.

<sup>54</sup> See ORS 757.365(10); OAR 860-084-0390; Order No. 10-198 at 21; see also *In the Matter of Portland Gen. Elec. Co. Application for Deferral of Expenses Associated with a Photovoltaic Volumetric Incentive Rate Pilot*, Docket No. UM 1482, Order No. 11-059 (Feb. 16, 2011) and *In the Matter of PacifiCorp, dba Pac. Power Application for Deferred Accounting Order*, Docket No. UM 1483, Order No. 11-021 (Jan. 12, 2011) (approving request for deferral of solar incentive program costs for PGE and Pacific Power; initial deferrals have been reauthorized every year).

<sup>55</sup> CUB’s Opening Brief at 12.

<sup>56</sup> ICNU’s Opening Brief at 15.

1 through pilots, mandated program reviews, etc.<sup>57</sup> The Joint Utilities' recommendation for  
2 review following three years of implementation is fully consistent with this tradition.

3 While the RRTM would carve out the RPS-related NPC from the PCAM, all  
4 procedural safeguards associated with the PCAM will remain intact and will also apply to the  
5 RRTM. Interested parties will have an opportunity to review and audit each utility's PCAM  
6 and RRTM filings, and both the PCAM and RRTM will be subject to final prudence review  
7 by the Commission.

### 8 III. CONCLUSION

9 The Joint Utilities have made significant progress toward the RPS target of serving 25  
10 percent of load with renewable energy by 2025. Despite diligent compliance, the Joint  
11 Utilities have suffered persistent under-recovery of NPC-related RPS compliance costs  
12 because of limitations in existing cost recovery mechanisms. Most variances in NPC  
13 attributable to RPS compliance costs are absorbed by the Joint Utilities through operation of  
14 the PCAM's deadband, sharing bands, and earnings test, and variances in PTCs are not  
15 captured in the PCAM at all. The RRTM is designed to identify and isolate these RPS  
16 compliance costs, and provide for full recovery as intended by ORS 469A.120(1). The Joint  
17 Utilities urge the Commission to adopt an integrated RRTM, including variances in NPC and  
18 PTCs, but as an alternative, request a PTC-only RRTM.

---

<sup>57</sup> See *In the Matter of Portland Gen. Elec. Co. Application for Deferred Accounting of Revenues and Expenses Associated with a Residential Critical Peak Pricing Pilot*, Docket No. UM 1427, Order No. 09-395 (Oct. 2, 2009); *In the Matter of PacifiCorp, dba Pac. Power, Establishes Original Tariff Sheets in Schedule 8, On-Bill Repayment Pilot Program, Allowing Pass-Through Billing Agent Services as Part of the Portland Clean Energy Fund*, Docket No. UM 1435, Order No. 09-260 (July 7, 2009) (approving on-bill repayment pilot program for financing energy efficiency investments); *In the Matter of Portland Gen. Elec. Co. Offer of Optional Demand Response Pilot Program to Large Nonresidential Customers*, Docket No. UE 205, Order No. 09-254 (July 6, 2009) (approving PGE's pilot demand response program); *In the Matter of the Application of PacifiCorp, dba Pac. Power & Light Co., to Implement an Experimental Customer Choice Program in Or. (Advice No. 98-001)*, Docket No. UE 105, Order No. 98-157 (Apr. 15, 1998) (approving pre-SB 1149 direct access pilot program); *In the Matter of Revised Tariff Schedules in Or. filed by PacifiCorp, dba Pac. Power & Light Co.*, Docket No. UE 94, Order No. 96-175 (July 10, 1996) (phasing in Pacific Power's proposal for alternative form of regulation).

1           The Commission can best effectuate the industry transformation envisioned by the  
2 RPS by making acquisition and dispatch of renewable resources cost neutral for the Joint  
3 Utilities. The RRTM will achieve that end. The Joint Utilities urge the Commission to adopt  
4 the RRTM to fulfill the cost recovery requirement and policy objectives of Oregon's RPS.

Respectfully submitted this 2nd day of November, 2015.



Katherine A. McDowell  
McDowell Rackner & Gibson PC

Matthew McVee  
PacifiCorp d/b/a/ Pacific Power

Douglas C. Tingey  
Portland General Electric Company

Attorneys for Portland General Electric Company  
and Pacific Power