BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1662

In the Matter of

PORTLAND GENERAL ELECTRIC COMPANY and

PACIFICORP, dba PACIFIC POWER

Request for Generic Power Cost Adjustment Mechanism Investigation.

BRIEF

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I. Introduction.

In this docket, Portland General Electric Company (PGE) and PacifiCorp ask the Commission to implement a special cost recovery mechanism for net variable power costs (NVPC) associated with renewable resources acquired to comply with Oregon's Renewable Portfolio Standard (RPS). The utilities argue a cost recovery mechanism without a deadband and sharing is needed for RPS-related NVPC to keep the legislature's "promise" that utilities would fully recover costs to comply with the RPS.[1]
The Commission should reject the Joint Utilities' request.

The legislature did not curtail the Commission's ratemaking authority over RPS-related NVPC, but left the rate-making treatment of RPS-related NVPC wholly to the Commission's discretion. The Commission has previously decided that the design of automatic adjustment recovery mechanisms for NVPC should include a deadband and sharing mechanism to allocate cost-recovery risk between ratepayers and shareholders.[2] There is nothing materially different about variable power costs associated with renewable resources acquired to comply with the RPS that warrants a different recovery mechanism. And, even if there is a material difference between NVPC for RPS-resources and all other resources, the Commission should still reject the mechanism proposed by PGE and PacifiCorp because of the potential harm to customers.

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[1] Joint Prehearing Brief of Portland General Electric Company and PacifiCorp 2.

[2] See e.g., Order No. 07-015(designing PCAM for PGE).

II. Analysis.

A. The language of Senate Bill 838 does not support the Joint Utilities' proposed recovery mechanism.

1. SB 838 and the Joint Utilities' proposal.

In 2007, the Oregon legislature adopted Senate Bill (SB) 838 implementing the RPS under which a certain percentage of generation resources used by PGE and PacifiCorp to serve retail load must be renewable. SB 838 specifies that prudently incurred costs associated with compliance with the RPS are "recoverable" in rates charged by electric companies, but with one exception, does not limit the Commission's authority to determine the ratemaking treatment of these recoverable costs.[3] The exception is that SB 838 specifies that the Commission must allow utilities to recover costs to construct or otherwise acquire facilities that generate electricity from renewable energy sources and associated transmission under an automatic adjustment clause.[4]

Currently, the Joint Utilities recover NVPC for all generation resources under power cost adjustment mechanisms (PCAMs) that allow the utilities to change power cost rates each year to take into account updated forecasts and to retroactively true-up amounts collected under forecasted rates to actual costs, subject to a deadband, sharing mechanism, and earnings test.[5] The Joint Utilities object to recovery of NVPC associated with RPS resources under these PCAMs because the utilities must absorb some of these costs under the deadband, sharing, and earnings test.[6] The Joint Utilities assert that the Commission should allow them to recover RPS-related NVPC under their proposed

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[3] This requirement is now found in ORS 469A.120(1).

[4] ORS 469A.120(2).

[5] Order No. 07-015 (adopting PGE's PCAM); Order No. 12-493 (adopting PacifiCorp's mechanism).

[6] Joint Prehearing Brief of Portland General Electric and PacifiCorp at 2.

renewable resource tracking mechanism (RRTM) that does not require the utilities to absorb any of the NVPC associated with resources acquired for the RPS.[7]

The Joint Utilities state that their RRTM proposal is based on language in Section 13(1) of SB 838 that "all prudently incurred costs associated with the compliance with a renewable portfolio standard are recoverable in the rates of an electric company[.]"[8] The Joint Utilities assert the legislature's decision to make these costs "recoverable" was the legislature "promise" to the utilities that they would recover the costs associated with SB 838.[9] Staff disagrees.

2. The plain meaning of "recoverable" supports the Commission's interpretation of SB 838.

In a 2007 order regarding implementation of the Renewable Adjustment Clause for costs to construct renewable resources, the Commission addressed the meaning of "recoverable" in Section 13(1) of SB 838:

> 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.[10]

The Commission's interpretation of "recoverable" is supported by the statutory construction analysis used by the Oregon courts.

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[7] PGE-PAC/100, Tinker-Dickman/6-8.

[8] PGE-PAC/100, Tinker-Dickman/4.

[99] Joint Prehearing Brief of Portland General Electric and PacifiCorp at 2.

[10] *In re: PacifiCorp dba Pacific Power*, Order No. 08-548.

To determine the meaning of a statute, an Oregon court will start by examining the text and context of a statute, considering legislative history to the extent the court believes appropriate.[11] "Absent a special definition, [Oregon appellate courts] ordinarily would resort to dictionary definitions [to determine the meaning of statutory text], assuming that the legislature meant to use a word of common usage in its ordinary sense."[12] According to *Webster's Third New Int'l Dictionary,*[13] "recoverable" means "capable of recovery."[14] Nothing in the other sections of SB 838 (the context of the bill) suggests that the legislature intended anything other than this plain meaning of "recoverable" the Commission has already adopted in its 2007 order.

3. The legislative history of SB 838 supports the conclusion the legislature left the ratemaking treatment of RPS-related NVPC to the Commission.

Legislative history of SB 838 supports the Commission's previous interpretation of "recoverable" in section 13(1) of SB 838 in that it reflects the legislature did not intend to limit the Commission's ratemaking authority over certain types of costs incurred to comply with the RPS.[15] Amendments to SB 838 adopted by the House Committee on Energy and the Environment reflect the legislature did not intend to compel any particular ratemaking treatment for RPS-related costs, other than costs to acquire

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[11] *State v. Gaines*, 346 Or 160, 171 (2009).

[12] *State v. Murray,* 340 Or 599, 604, 136 P3d 10 (2006).

[13] *Webster's Third New Int'l Dictionary* (unabridged ed. 2002) appears to be the dictionary of choice in the Oregon appellate courts. *See, e.g., Pacificorp Power Marketing, Inc. v. Dept. Revenue*, 340 Or 204, 215, 131 P3d 725 (2006).

[14] *Webster's Third New Int'l Dictionary* (unabridged ed. 2002) at 1898.

[15] Oregon courts can consider legislative history at the first level of analysis under the statutory construction analysis announced in *State v. Gaines. State v. Gaines, supra* 346 Or at 171.

resources and related transmission costs. The A-Engrossed version of SB 838 that was passed out of the Senate included language requiring the Commission allow rate recovery of all prudently-incurred costs associated with compliance with the RPS under an automatic adjustment mechanism.[16] At a public hearing before the House Energy and

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[16] SB 838 A-Engrossed Section 13. Cost recovery by electric companies.

Except as provided in section 20(5) of this 2007 Act, all prudently incurred costs associated with compliance with a renewable portfolio standard are recoverable in the rates of an electric company, including 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 and other costs associated with transmission and delivery of qualifying electricity to retail electricity consumers.

Costs associated with compliance with a renewable portfolio standard are not an above-market cost for the purposes of ORS 757.600 to 757.687.

The Public Utility Commission shall establish an automatic adjustment clause as defined in ORS 757.210 or another method that allows timely recovery of costs prudently incurred by the electric company to construct or otherwise acquire facilities that generate electricity from renewable energy sources or for associated electricity transmission. An electric company must file with the commission for approval of the use of an automatic adjustment clause or other method of timely recovery of costs established under this subsection. The commission shall provide opportunity for public comment on the filing.

Section 13a. 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 any 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.** (Emphasis added.)

Environment Committee, a witness testified that the automatic adjustment clause in Senate Bill 838 A-Engrossed appeared to have an error because the bill was supposed to require an automatic adjustment clause for recovery of the utility's investment in resources and associated transmission under an automatic adjustment clause, but not other RPS-related costs.

> [Mark Nelson/ICNU:] I'm not sure if this was a mistake, but originally our understanding was the only thing that was going to be included in the automatic adjustment clause were those costs prudently incurred that you find on lines 24 to 27 to construct or otherwise acquire facilities that generate electricity and, or, for associated electricity transmission. That was our understanding of what would go into an automatic adjustment clause.
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> But what I believe, I hope, is a typographical error all the costs that are in lines 16-21 including interconnection costs, costs associated with using physical or financial assets to integrate, firm or shape renewable energy sources on a firm annual basis. We believe that that also is going to be included by error under [an] automatic adjustment clause.
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> The error is in line 36 with a reference to 13(1). We believe that should be a reference to 13(3) tying back to the capital cost not all costs related to renewables. That was our understanding of what the agreement was. If I'm wrong, then we need to know that. But, to add all those other costs to an automatic adjustment clause without an evidentiary process, hearing, just turns the whole PUC process, we believe, on its head.[17]

The House Energy and Environment Committee subsequently removed language in SB 838 A-Engrossed requiring the Commission to adopt an automatic adjustment clause for all prudently incurred costs associated with RPS compliance. Consequently, the Enrolled version of SB 838 specifies the ratemaking treatment for the subset of costs described in section 13(3) of the bill (capital and transmission), but does not specify the ratemaking treatment for any other RPS-related costs.

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[17] Appendix A: Excerpt of testimony to the House Energy and Environment Committee, April 18, 2007, Time 34:10 – 35:56.

Testimony by a particular witness or statements by a legislator in a committee meeting has questionable probative value on determining the legislature's intent in adopting legislation because it is often unclear whether the entire legislative body was even aware of the testimony or comments in a particular committee meeting.[18] In contrast, the legislature's adoption of a version of SB 838 that is silent as to the ratemaking treatment that should be afforded prudently-incurred costs to comply with SB 838, other than those described in section 13(3) to acquire resources and related transmission costs, supports the conclusion the legislature did not intend to limit the Commission's discretion to decide the appropriate ratemaking treatment of non-section 13(3) costs. [19]

B. The Commission has broad ratemaking authority.

The Commission has broad discretion to determine the ratemaking treatment of costs incurred by the utility to serve customers. In a 2014 opinion, the Oregon Supreme Court explained "ratemaking is a unique enterprise that is governed by statute but largely left to the PUC's discretion."[20] The Oregon Supreme Court has previously observed that

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[18] *State v. Gaines, supra* 346 Or at 171 ("Only the text of a statute receives the consideration and approval of a majority of the members of the legislature, as required to have the effect of law. * * * The formal requirements of lawmaking produce the best source from which to discern the legislature's intent, for it is not the intent of the individual legislators that governs, but the intent of the legislature as formally enacted into law[.]" (Citation omitted.)

[19] *Cf. State v. Hess*, 342 Or 647, 661 ("We are reluctant to infer from the legislature's silence an intent to deprive the court of its traditional authority * * *.").

[20] *Gearhart v. Public Utility Commission of Oregon,* 356 Or 216, 221, 339 P.3d 904 (2014). *See also Springfield Education Assn. v. School Dist.,* 290 Or 217, 230, 621 P.2d 547 (1980)(explaining that the PUC is empowered to "make delegated policy choices of a legislative nature within the broadly stated legislative policy").

that the PUC is empowered to "make delegated policy choices of a legislative nature within the broadly stated legislative policy." It is within the Commission's discretion to allow the Joint Utilities to recover RPS-related NVPC subject to a risk-sharing mechanism that balances the interests of ratepayers and the utilities.

C. The Commission appropriately exercised its discretion to require recovery of RPS-related NVPC under power cost adjustment mechanisms applicable to all NVPC.

1. The RRTM does not comply with the five criteria the Commission has announced for PCAMs.

The Commission has concluded that five general principles form the basis of a well-designed PCAM: (1) any adjustment under a PCAM should be limited to unusual events and capture power cost variances that exceed those considered normal business risk for the utility; (2) there should be no adjustments if the utility's overall earnings are reasonable; (3) the PCAM's application should result in revenue neutrality; (4) the PCAM should operate in the long-term to balance the interests of the utility shareholder and ratepayer; and (5) the PCAM should provide an incentive to manage its costs effectively.[21]

The RRTM is not based on these principles. The RRTM would (1) allow dollar-for-dollar recovery of NVPC for the Joint Utilities' renewable resources rather than recovery of power cost variances that exceed the utilities' normal business risk, (2) allow recovery of all actual RPS-related NVPC that exceeds what is forecasted in rates even when the utility's overall earnings are reasonable; (3) not balance risk between shareholders and ratepayers, but would shift all risk to ratepayers; and (4) not provide an incentive to the utilities to manage costs effectively.[22]

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[21] Order No. 07-015 at 26-27; Order No. 12-493 at 13-16.

[22] In fact, the RRTM would create a perverse incentive to poorly forecast the market. As an example, if the utilities forecast the test year market to be zero for all hours, the RRTM would provide for full recovery of 100% of the market value of the wind energy.

Footnote continued...

2. RPS-related NVPC does not warrant different treatment.

There is no material difference between the NVPC associated with RPS-compliant resources and NVPC associated with other resources that warrants modified rate-making treatment for RPS-related NVPC. Staff acknowledges that the utilities are required to acquire renewable resources to comply with the RPS, but this requirement is little different from the general requirement on utilities to acquire sufficient resources to serve their retail load.

Second, the risk associated with recovery of RPS-related NVPC is not materially different from risks associated with recovery of non-RPS-related NVPC. In their testimony, the Joint Utilities assert that the actual variable costs and benefits of renewable resources acquired to meet the RPS are not reflected in the Joint Utilities' rates "given the challenges of forecasting intermittent generation" and the fact the Joint Utilities are not allowed to recover the entire variance between forecasted costs and actual costs.[23] Forecast risk is not unique to renewable resources. Instead, "[f]orecast errors exist with all generation and are a normal part of a company's operation."[24]

Notably, the Commission announced criteria when considering a hydro-only PCAM for PGE in 2005 that is very similar to the criteria the Commission adopted in 2007. In 2005, the Commission opined that a hydro-only cost-recovery mechanism should be 1) limited to unusual events, 2) no adjustment if overall earnings are reasonable; 3) revenue neutral; and 4) long-term.[25]

(...continued)

[23] PGE-PAC/100, Tinker-Dickman/1 and 5-6.

[24] Staff/100, Crider/4.

[25] Order No. 05-1261; *Application for a Hydro Generation Power Cost Adjustment Mechanism, (UE 165) and Application for Deferral of Costs and Benefits Due to Hydro Generation Variance. (UM 1187).*

Testimony presented by the Industrial Customers of Northwest Utilities (ICNU) demonstrates that the forecast variability for wind resources is not materially different than that for the utilities' hydro resources.[26] The Commission's conclusion regarding a hydro-only PCAM should apply to a PCAM limited to RPS resources. Cost recovery for RPS-resources should be subject to a deadband and sharing, notwithstanding any difficulty in forecasting for these resources.

Third, the fact that actual NVPC does not match forecasted NVPC, for both RPS- and non-RPS-related resources, is due in substantial part to the difference between forecasted and actual market prices.[27] Risk of variability between actual and forecasted market prices has nothing to do with generating energy from renewable resources.[28] Instead, as Mr. Mullins testified on behalf of ICNU that "[v]ariances between forecast and actual market prices are caused by a multitude of factors largely unrelated to the variability of renewable resources."[29]

Because the generation forecast risk for RPS resources is not materially different from that for other generation resources and the market risk is the same for both sets of resources, it is inappropriate to afford different ratemaking treatment to the RPS resources. This conclusion does not change because all NVPC for RPS resources is "recoverable" in rates under Section 13(1) of SB 838. As the Commission has previously stated, prudently incurred costs have always been recoverable in rates and the

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[26] ICNU/100, Mullins/13-16.

[27] See Staff/100, Crider/10.

[28] Staff/100, Crider/8.

[29] ICNU/100, Mullins/11. See also Staff/100, Crider/8 ("The utilities proposal shifts market price risk from the company to customers and this has nothing to do with renewable resource cost recovery.").

requirement in SB 838(1) that prudently-incurred RPS-related costs are "recoverable" is not new.[30]

D. The design of the Joint Utilities' proposed RRTM shifts too much risk to ratepayers and is otherwise not fair to customers.

As noted above, the market risk is the same for RPS and non-RPS resources. Accordingly, a recovery mechanism that shifts to customers all market risk for RPS resources is not warranted. And, a cost-recovery mechanism that allows dollar-for-dollar rate recovery for RPS-related NVPC is not fair to customers for the following reasons.

First, attempting to carve out a discrete segment of the Joint Utilities' integrated resource portfolio by simply comparing the generation of this segment to market prices inevitably ignores the costs and benefits obtained through the interaction of all of the resources in the Joint Utilities' portfolios, and therefore will result in an inaccurate assessment of the Joint Utilities' RPS-related costs.[31]

Second, the proposed RRTM could result in the utilities surcharging customers for RPS-related NVPC even when the utility is not able to recover NVPC for other resources because its earnings are too high.

Third, including the production tax credits (PTCs) in the true-up mechanism will result in asymmetrical recovery unless accumulated deferred income taxes are also adjusted.[32]

E. The Joint Utilities should address any under-collection of RPS-related NVPC with modifications to forecasting methodologies.

ICNU notes in its prehearing brief that Staff's alternate design for a carve-out cost-recovery mechanism does not address all the infirmities associated with a special

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[30] Order No. 08-548 at 18.

[31] ICNU/100, Mullins/11.

[32] Prehearing Brief of ICNU at 18.

cost recovery mechanism for a subset of NVPC.[33] Staff agrees. This is why Staff's primary recommendation is to reject the Joint Utilities' request for a special recovery mechanism.

Staff recommends the utilities work on developing improved generation production forecasting methodologies to address their risk of under-collecting NVPC.[34] The PCAMs allow each company to recover in rates 100% of the utilities' forecasted costs if the forecasts are accurate and correctly reflect actual costs. It is when the forecast of power costs is in error that the company under-collects. Therefore, improving the accuracy of forecasts will limit the potential that utilities will not fully recover their power costs.

To the extent the Commission grants the Joint Utilities request for special rate recovery of RPS-related NVPC, Staff recommends that the Commission apply the earnings test to recovery of RPS-related NVPC so that the utilities recovery of RPS-related costs does not cause the utilities to over earn.[35]

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[33] Prehearing Brief of ICNU at 19.

[34] Staff/100, Crider/5-7.

[35] Staff/100, Crider/16.

III. Conclusion.

Staff recommends that the Commission reject the Joint Utilities' proposal for the RRTM.

DATED this 19 day of October, 2015.

Respectfully submitted,

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APPENDIX

APPENDIX A

Testimony to the Oregon State Legislature House Energy and Environment Committee on March 18, 2007 re: Senate Bill 838A-Engrossed:

> [Mark Nelson/ICNU:] I'm not sure if this was a mistake, but originally our understanding was the only thing that was going to be included in the automatic adjustment clause were those costs prudently incurred that you find on lines 24 to 27 to construct or otherwise acquire facilities that generate electricity and, or, for associated electricity transmission. That was our understanding of what would go into an automatic adjustment clause.
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[1] Testimony to the House Energy and Environment Committee, April 18, 2007, Time 34:10 – 35:56.

Excerpt from Oregon Legislature 2007 Regular Session SB 838A-Engrossed

SB 838 A-Engrossed Section 13. Cost recovery by electric companies.

(1) Except as provided in section 20(5) of this 2007 Act, all prudently incurred costs associated with compliance with a renewable portfolio standard are recoverable in the rates of an electric company, including 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 and other costs associated with transmission and delivery of qualifying electricity to retail electricity consumers.

(2) Costs associated with compliance with a renewable portfolio standard are not an above-market cost for the purposes of ORS 757.600 to 757.687.

(3) The Public Utility Commission shall establish an automatic adjustment clause as defined in ORS 757.210 or another method that allows timely recovery of costs prudently incurred by the electric company to construct or otherwise acquire facilities that generate electricity from renewable energy sources or for associated electricity transmission. An electric company must file with the commission for approval of the use of an automatic adjustment clause or other method of timely recovery of costs established under this subsection. The commission shall provide opportunity for public comment on the filing.

Section 13a. 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 any 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.