BEFORE THE PUBLIC UTILITY COMMISSION

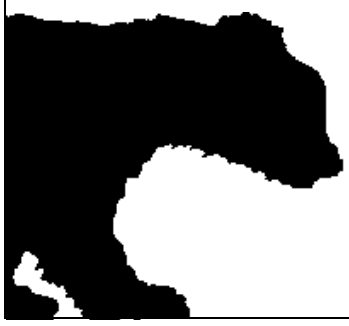
OF OREGON

UM 1662

In the Matter of	)
PORTLAND GENERAL ELECTRIC COMPANY and PACIFICORP dba PACIFIC POWER	)
Request for Generic Power Cost Adjustment Mechanism Investigation	)

REPLY BRIEF OF THE CITIZENS' UTILITY BOARD OF OREGON

November 2, 2015



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	)	REPLY BRIEF OF THE CITIZENS' UTILITY BOARD OF OREGON

Pursuant to Administrative Law Judge ("ALJ") Powers' Ruling issued September 23, 2015, the Citizens' Utility Board of Oregon ("CUB") submits its Reply Brief in docket UM 1662.

I. Argument

The central question in this docket is whether there is a legal or policy requirement that variable costs, which have some relationship to the RPS, should be recovered on a dollar-for-dollar basis.

The Joint Utilities argue that the Commission has discretion to "fill in the missing pieces" of cost recovery pursuant to ORS 469A.120(1), but that its discretion is limited by ORS 469A.120(1)'s requirement that 100 percent of RPS compliance costs must be

recovered in every single year.[1] If, as the Joint Utilities argue, the Commission cannot rely on forecasts alone to ensure 100% cost recovery because they are imperfect,[2] then we must have a true-up mechanism. And if the true-up mechanism cannot have deadbands, sharing and/or an earnings test[3] that could in any way impact 100% cost recovery in every single year,[4] there is really only one option for the Commission: a mechanism that would allow for dollar-for-dollar recovery. Therefore, according to the Joint Utilities, the next question becomes one of design. In that regard, they have proposed the RRTM and have identified two essential elements: the inclusion of market prices and the inclusion of production tax credits (PTCs).[5]

Contrary to the Joint Utilities' arguments otherwise, the Commission's discretion is not limited by law or policy to a dollar-for-dollar recovery mechanism. The text, context and legislative history of ORS 469A.120(1) make clear that the Commission is not *required* to impose dollar-for-dollar recovery in order for costs to be "recoverable" pursuant to ORS 469A.120(1). Furthermore, the Commission has broad ratemaking authority to determine whether the PCAM design principles should apply to variable RPS compliance costs. Because the Joint Utilities have not presented compelling legal or policy arguments that the Commission should abandon the current ratemaking treatment for these costs, the Commission should reject the RRTM.

[1] UM 1662 – Joint Utilities Opening Brief at 10.
[2] UM 1662 – Joint Utilities Opening Brief at 4-5.
[3] CUB notes that an earnings test does not actually impact the utilities' ability to achieve 100 percent cost recovery. Rather, the purpose of the earnings test is to determine whether revenues were adequate enough to cover the cost. If so, recovery is deemed complete.
[4] UM 1662 – Joint Utilities Opening Brief at 5.
[5] UM 1662 – Joint Utilities Opening Brief at 11-14.

A. The Joint Utilities' variable RPS compliance costs are "recoverable" under existing ratemaking mechanisms

All of the parties to this docket have made arguments related to the statutory interpretation of ORS 469A.120.[6] The Joint Utilities argue that the plain language, context and legislative history all support their request for dollar-for-dollar recovery of variable RPS compliance costs. CUB, Staff and ICNU have argued the opposite--that nothing in the plain language, context or legislative history of the statute compels the Commission to adopt a mechanism for dollar-for-dollar recovery of these costs. Under current ratemaking treatment, the Joint Utilities' variable RPS compliance costs are "recoverable" as required by ORS 469A.120(1).

i. The plain language of ORS 469A.120(1) does not compel dollar-for-dollar recovery of variable RPS compliance costs.

In its Prehearing Brief, CUB argued that the legislature's intent, as evidenced by the context and legislative history of the statute, was not as straightforward as the Joint

[6] ORS 469A.120 provides, in relevant part:

> (1) Except as provided in ORS 469A.180 (5), ***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, above-market costs and other costs associated with transmission and delivery of qualifying electricity to retail electricity consumers.
>
> (2) ***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 an electric company to construct or otherwise acquire facilities that generate electricity from renewable energy sources and for associated electricity transmission***. Notwithstanding any other provision of law, upon the request of any interested person the commission shall conduct a proceeding to establish the terms of the automatic adjustment clause or other method for timely recovery of costs. The commission shall provide parties to the proceeding with the procedural rights described in ORS 756.500 to 756.610, including but not limited to the opportunity to develop an evidentiary record, conduct discovery, introduce evidence, conduct cross-examination and submit written briefs and oral argument. The commission shall issue a written order with findings on the evidentiary record developed in the proceeding.
>
> (emphasis added).

Utilities' plain language interpretation of the statute.[7] Accordingly, CUB has focused its analysis on the context and legislative history of the statute. To be clear, however, CUB agrees with Staff and ICNU that the plain language of ORS 469A.120(1) does not require dollar-for-dollar recovery of variable RPS compliance costs in order for these costs to be "recoverable."[8]

ii. The context of ORS 469A.120(1) does not compel dollar-for-dollar recovery of variable RPS compliance costs.

The Joint Utilities rely on both ORS 469A.120 subsection (1)'s context within the broader statute and its context among other statutes with similar wording to support their argument that the Commission is bound to adopt a dollar-for-dollar recovery mechanism for variable RPS compliance costs. The Joint Utilities' arguments are unsupported and contrary to accepted principles of statutory interpretation.

First, the Joint Utilities argue that ORS 469A.120 subsection (2)'s inclusion of an automatic adjustment clause for investment in plant does not prevent the Commission from adopting the RRTM pursuant to ORS 469A.120 subsection (1).[9] CUB agrees.[10] Nothing in subsection (2) limits the Commission's discretion to adopt a cost recovery mechanism, including dollar-for-dollar recovery, for costs subject to recovery via subsection (1). However, the context of subsection (2) makes clear that the legislature did not intend to *limit* the Commission's discretion to dollar-for-dollar recovery variable RPS compliance costs. Contrary to the Joint Utilities' arguments otherwise, nothing in subsection (1) *requires* the Commission to adopt a mechanism that would allow for

[7] UM 1662 - CUB Prehearing Brief at 5.
[8] UM 1662 - CUB Prehearing Brief at 8.
[9] UM 1662 - Joint Utilities Opening Brief at 8.
[10] UM 1662 - CUB/100/Jenks-Hanhan/6.

dollar-for-dollar recovery for variable RPS compliance costs. Nevertheless, as CUB has discussed extensively in testimony and briefing, from a policy perspective, the Commission should decline to adopt a dollar-for-dollar recovery mechanism.

Second, the Joint Utilities argue that that Staff's, ICNU's and CUB's interpretation of ORS 469A.120(1) is unsupported given the context of subsection (1) within ORS 469A.120 as a whole.[11] Specifically, they rely on a portion of ORS 174.010 in arguing that the legislature would not have listed the types of costs recoverable in ORS 469A.120(1) if these costs were merely meant to be recovered through existing ratemaking mechanisms.[12] But this argument is illogical and unsupported. The statute must be read to give purpose to every word of the legislature.[13] The Joint Utilities argue that the distinction is merely one of timing and mechanism, but that the Commission is bound to impose dollar-for-dollar recovery of RPS compliance costs.[14] But this interpretation would negate the legislature's intent in prescribing a specific cost-recovery mechanism for investment in plant. The logical interpretation, which is supported by legislative history, is that costs subject to recovery via subsection (1) are variable, and therefore are more appropriately recovered on an annual basis through existing mechanisms. The costs enumerated in subsection (2) are related to investment in plant and given the concern about regulatory lag, a carve-out for these costs was deemed appropriate.

[11] UM 1662 – Joint Utilities Opening Brief at 2.
[12] UM 1662 – Joint Utilities Opening Brief at 2; *see also* Joint Utilities Prehearing Brief at 8-9.
[13] *See* ORS 174.010, which states "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***." (emphasis added).
[14] UM 1662 – Joint Utilities Opening Brief at 8.

Third, the Joint Utilities rely upon the Commission's interpretation of "similar" cost recovery language in SB 1149 and the solar volumetric incentive rate (VIR) to support their argument for dollar-for-dollar recovery of variable RPS compliance costs.[15] The Oregon Supreme Court has recognized that contextual evidence, including related statutes, is useful in statutory interpretation.[16] To determine whether statutes are related, the court looks to whether they were enacted at the same time,[17] are on the same subject,[18] directly or indirectly refer to one another, [19] or have the same underlying policies.[20]

The Commission's interpretation of recovery for implementation costs related to SB 1149 is immaterial to the case at hand. The Joint Utilities rely on the "similar" language in SB 1149, Section 18 (4), which provides that the electric company have "the opportunity to recover all costs prudently incurred."[21] Specifically, Joint Utilities argue it relevant that the Commission previously determined that ORS 757.259, the deferral statute, should not apply to SB 1149 implementation costs because it would limit the utility's ability to be financially whole in industry restructuring.[22] They argue that a similar logic is present here—that the utility should be left whole in implementing the RPS.[23] The Joint Utilities' argument is unpersuasive. SB 1149 and the RPS have different underlying policy goals—one is to foster investment in renewables, the other is

[15] UM 1662 - Joint Utilities Opening Brief at 6-8,
[16] *Portland Gen. Elec. Co., v. Bureau of Labor & Indus.*, 317 Or 606, 610-612 (1993).
[17] *See e.g. Tharp v. Psychiatric Sec. Review Bd.*, 338 Or 413, 422 (2005).
[18] *See e.g. Chevron U.S.A., Inc. v. Motor Vehicles Div.*, 49 Or App 1099, 1103-1104 (1980).
[19] *See e.g. State v. Betts*, 235 Or 127, 136-138 (1963).
[20] *See e.g. General Electric Credit Corp. v. Oregon State Tax Com.*, 231 Or 570, 591 (1962).
[21] SB 1149 Section 18(4).
[22] UM 1662 - Joint Utilities Opening Brief at 6-7.
[23] UM 1662 - Joint Utilities Opening Brief at 6-7.

to implement industry restructuring. Nothing in the Commission's determination of cost recovery pursuant to SB 1149 informs cost recovery for RPS compliance costs.

The Joint Utilities' reliance on the solar VIR statute[24] is similarly misplaced for several reasons. First, the solar VIR statute was enacted in 2011, two years *after* ORS 469A.120.[25] Second, the statutes are not on the same subject. Third, as the Joint Utilities' concede, there is no reference in the solar VIR statute itself to the automatic adjustment clause in ORS 469A.120. The solar VIR statute merely provides that all prudently incurred costs are recoverable, but does not dictate a particular recovery mechanism.[26] Although the Commission determined dollar-for-dollar recovery of VIR program compliance costs was appropriate, it is notable that the solar VIR program is a pilot and that there was likely not enough information to develop a meaningful forecast for these costs, unlike the present case.

The concept of dollar-for-dollar recovery and automatic adjustment clauses were not new when stakeholders, the legislature and the Commission were implementing and interpreting the RPS. These concepts, as the Joint Utilities point out, span rate recovery in several areas. However, simply because the Commission has determined dollar-for-dollar recovery to be appropriate in certain circumstances does not mean that it is appropriate in all. Contrary to the Joint Utilities' argument, nothing in ORS 469A.120(1) requires dollar-for-dollar recovery.

[24] ORS 757.365.
[25] The Solar VIR statute was enacted in 2009 via House Bill 3039, whereas SB 838 was enacted in 2007.
[26] ORS 757.365(10).

iii. The legislative history of ORS 469A.120(1) does not compel dollar-for-dollar recovery of variable RPS compliance costs.

All of the parties to this docket have introduced and relied upon legislative history to support their interpretation of the statute. As CUB has previously stated, the Oregon Supreme Court has found that legislative history can confirm a seemingly plain meaning, but can also be used to demonstrate that superficially clear language is not so clear.[27] In this case, the legislative history does not confirm the "seemingly plain meaning" advocated for by the Joint Utilities.

Fundamentally, the legislative history relied upon by each party supports three general conclusions: (1) no stakeholder or legislator unquestionably intended dollar-for-dollar recovery of the costs subject to recovery via subsection (1); (2) for variable RPS compliance costs, stakeholders contemplated existing ratemaking mechanisms, which do not allow for dollar-for-dollar recovery; and (3) the automatic adjustment clause was intended merely to address the issue of regulatory lag.[28] None of these conclusions support the Joint Utilities' request for dollar-for-dollar recovery of variable RPS compliance costs.

In support of their argument for 100% cost recovery of variable RPS compliance costs, the Joint Utilities rely on former Commission Chair Lee Beyer's testimony relating to the automatic adjustment clause discussed in subsection (2)--the subsection of the cost recovery statute that deals with investment in plant--and argue that "it makes sense" because RPS obligations are ongoing.[29] There is no evidence on the record that Chair

[27] *State v. Gaines*, 346 Or 160, 172 (2009).
[28] *See* UM 1662 – PGE-PAC/200/Tinker-Dickman/4-5; ICNU/300; ICNU/301; CUB/100/Jenks-Hanhan/4-6; CUB Prehearing Brief at 7-8; Staff Opening Brief at Appendix A; ICNU Opening Brief at 5-8.
[29] UM 1662 – Joint Utilities Opening Brief at 9.

Beyer intended his comments to apply to anything other than the automatic adjustment clause and his logic is not "equally applicable to variable RPS compliance costs."[30] In fact, Chair Beyer had several opportunities to "apply his logic" to variable RPS compliance costs when he signed orders allowing the recovery of these costs to be accomplished solely through forecasted rates, but declined to do so.[31] There are two subsections of ORS 469A.120 that relate to types of costs and methods of recovery, not one. As conceded by the Joint Utilities, Chair Beyer's comments were not directed at cost recovery, generally—they were clearly aimed at subsection (2)'s automatic adjustment clause.

B. The RRTM should be rejected

Aside from the legal and policy considerations discussed above and in CUB's, Staff's and ICNU's other briefs, the RRTM should be rejected because its design deficiencies.[32]

i. Market Prices

The Joint Utilities' argue that it is essential to reflect market prices in the RRTM.[33] First, the Joint Utilities argue that the use of market prices in ratemaking is not novel in the determination of net power costs.[34] While CUB agrees that market prices are appropriately used in some circumstances, the RRTM is not one. Use of market prices in

[30] UM 1662 - Joint Utilities Opening Brief at 9.
[31] *See e.g. In re Portland General Electric,* OPUC Docket No. UE 198, Order No. 08-505 (Oct. 21, 2008); *In re PacifiCorp,* OPUC Docket No. UE 199, Order No. 08-543 (Nov. 12, 2008); *In re PacifiCorp,* OPUC Docket No. UE 207, Order No. 09-432 (Oct. 30, 2009); *In re Portland General Electric*, OPUC Docket No. UE 208, Order No. 09-433 (Oct. 30, 2009).
[32] The Joint Utilities recent request for interim approval of the RRTM subject to review after three years should also be rejected.
[33] UM 1662 - Joint Utilities Opening Brief at 11.
[34] UM 1662 – Joint Utilities Opening Brief at 12.

this context would inappropriately shift risk to ratepayers[35] and would introduce fuel price risk to renewables.[36]

Second, the Joint Utilities argue that "variances in either generation or market price (or both together) result in real costs to the utility and historically both components have contributed to variances in RPS compliance costs."[37] But the Commission was unambiguous in its requirement that the Joint Utilities be able to isolate RPS variable costs *that are directly attributable to RPS compliance*.[38] The Company has not met this burden. Again, under the Joint Utilities' proposal, the wind forecast could be 99.9% accurate, but customers would still face a surcharge due almost exclusively to a forecast error in market prices.[39]

Fundamentally, the Joint Utilities' request is based on the assumption that renewables are never used to serve load, but are sold into the market. Consider an example where there is more actual generation of wind than the utility forecast, but good hydro conditions and low natural gas prices reduce the actual market price of electricity well below what was forecast. While the lower market prices will reduce the dispatch of the fossil fuel resource during the hours when it becomes less costly to purchase than generate, this is not true of renewable resources that have no on-going fuel costs. If the renewables were used to serve load, the lower market prices mean little because market purchases would not displace resources that have no fuel cost. Instead, the extra renewable generation could displace market purchases, therefore lowering costs. But

[35] UM 1662 – CUB's Prehearing Brief at 9-11.
[36] UM 1662 – CUB's Prehearing Brief at 12.
[37] UM 1662 – Joint Utilities Opening Brief at 11-12.
[38] Public Utility Commission of Oregon Staff Report, November 12, 2014 Public Meeting at 5 (Nov. 5, 2014). Staff's recommendation was adopted at the public meeting.
[39] UM 1662 – CUB Prehearing Brief at 10-11.

under the Joint Utilities' proposal, this circumstance would likely lead to a significant rate increase, because the lower market prices are used to value all of the wind production. Because the produced energy has a lower value than forecast, customers would be charged to recover this loss of value.

The Commission has clearly required the Joint Utilities to isolate the correct RPS variable costs that are directly attributable to RPS compliance. By definition, the use of an index (rather than the Company's actuals) does not achieve this objective. CUB's concern is not that PowerDex is not the appropriate index. CUB's concern is that any index that could be used would have little to do with the actual resource actions taken by the utility in managing its forecast errors, and each utility has a flexible fleet of generating resources and a variety of options in the marketplace that would actually be used to serve load in the event that renewable forecasts are inaccurate

ii. True-up of Production Tax Credits

The Joint Utilities urge the Commission to approve, in the very least, the RRTM to track changes in production tax credits (PTCs) because the variances are not otherwise recoverable outside of a general rate case.[40] A stand-alone mechanism to true-up PTCs, however, is inconsistent with current Oregon law.

Previously, as a matter of state policy, a utility's taxes were subject to true-up. Under SB 408, utilities subject to the law were required to file tax reports with the Commission annually, and the Commission was required to true-up the differences between taxes collected in rates and those actually paid to the taxing authority.[41] Implementation, however, was problematic and SB 408 was replaced by SB 967. SB

[40] UM 1662 - Joint Utilities Opening Brief at 11.
[41] SB 408, previously codified as ORS 757.267 and ORS 757.268 (repealed by SB 967).

967, codified as ORS 757.269, requires the Commission to set rates for utility taxes, including tax credits, on a forecast basis.[42] ORS 757.269(2)(a) requires the Commission to include, when setting rates, "all expected current and deferred tax balances and tax credits made in providing regulated utility service to the utility's customers in this state."[43] Accordingly, it is the policy of this state that utility taxes be forecast in rates, and are not subject to true-up.

The Joint Utilities' current ratemaking treatment for variable RPS compliance costs, including PTCs, is consistent with ORS 757.269. Because current rate recovery is consistent with Oregon law and there is nothing in ORS 469A.120 that requires the Commission to implement a true-up mechanism for variances in PTCs, the Commission should decline a mechanism that includes a true-up for PTCs.

iii. Earnings Test

CUB continues to advocate for the application of an earnings test should the Commission adopt the RRTM.[44]

C. Staff's alternative proposal should be rejected

CUB also continue to urge the Commission to reject Staff's alternative proposal because the current cost recovery mechanism allows for the recovery of the Joint Utilities' variable RPS compliance costs.[45]

[42] SB 967 is codified as ORS 757.269.
[43] ORS 757.269(2)(a).
[44] *See* UM 1662 – CUB Opening Brief at 11.
[45] *See* UM 1662 – CUB Opening Brief at 12.

II. Conclusion

CUB urges the Commission to reject the Joint Utilities' proposed RRTM. Dollar-for-dollar recovery of variable RPS compliance costs is not required under Oregon law, and the Joint Utilities' have presented no compelling argument to adopt such recovery on a policy basis. Furthermore, even if the Commission were to determine dollar-for-dollar recovery is appropriate, the RRTM is flawed, and should be rejected.

Respectfully submitted,

Sommer Templet Moser, OSB #105260
Staff Attorney
Citizens' Utility Board of Oregon
610 SW Broadway, Ste. 400
Portland, OR 97205
(503) 227-1984 phone
(503) 224-2596 fax
sommer@oregoncub.org