

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**

3 **UM 1662**

4 In the Matter of

5 PORTLAND GENERAL ELECTRIC
6 COMPANY and PACIFICORP dba
7 PACIFIC POWER,

8 Request for Generic Power Cost
9 Adjustment Mechanism Investigation

STAFF PREHEARING BRIEF

10 **I. Introduction.**

11 This is the final round of briefs regarding the request by Pacific Power and Portland
12 General Electric Co. (hereinafter the “Joint Utilities”) to implement a special cost recovery
13 mechanism to allow the Joint Utilities 100 percent cost recovery of net variable power costs
14 (NVPC) associated with resources acquired to comply with Oregon’s Renewable Portfolio
15 Standards (RPS). Staff, the Industrial Customers of Northwest Utilities (ICNU), and the
16 Citizens’ Utility Board of Oregon (CUB) oppose the Joint Utilities’ request because the Joint
17 Utilities’ proposed Renewable Resources Tracking Mechanism (RTTM) does not meet the
18 Commission’s five criteria for a NVPC recovery mechanism that protect ratepayers and allocate
19 risk between the utility and its retail customers. The Joint Utilities do not argue that their
20 proposed RTTM satisfies the Commission’s criteria for a NVPC recovery mechanism. Instead,
21 the Joint Utilities argue the RTTM is necessary to keep the legislature’s statutory “promise” of
22 100% cost recovery for prudently incurred costs associated with compliance with the RPS.¹

23 The Joint Utilities find this legislative promise in ORS 469A.120(1), which provides that
24 “all prudently incurred costs associated with compliance with a renewable portfolio standard are
25 recoverable in the rates of an electric company[.]” and in legislative history. Staff, CUB, and
26 ICNU disagree that the legislature’s categorization of prudently incurred RPS-related costs as

¹ Joint Utilities’ Prehearing Brief 9.

1 “recoverable” means the legislature intended to limit the Commission’s discretion over the
2 ratemaking treatment of those costs.

3 **II. Argument.**

4 **A. The Joint Utilities’ statutory construction analysis is not persuasive.**

5 The Joint Utilities take issue with Staff’s and the Intervenors’ interpretation of ORS
6 469A.120(1), “as providing only the basic opportunity for cost recovery that existed pre RPS.”²
7 The Joint Utilities assert that “[t]his ‘status quo’ interpretation implies that the legislature’s
8 words in ORS 469A.120(1) were meant to add nothing to the RPS, a result irreconcilable with
9 normal rules of statutory construction ”that effect should be given to all provisions of a statute if
10 possible.”³ The Joint Utilities also argue that Staff’s and the Intervenors’ interpretation is
11 inconsistent with “the legislature’s intent that (1) the RPS would do ‘no harm to the utilities’; and
12 (2) cost recovery would follow the RPS’s mandate to invest in specific resources.”⁴

13 The Joint Utilities’ arguments are easily refuted. First, as ICNU points out in its brief,
14 the Staff/CUB/ICNU interpretation of ORS 469A.120(1) *does* give effect to ORS 469A.120 and
15 is therefore consistent with principles of statutory construction.⁵ Under the Staff/CUB/ICNU
16 interpretation, ORS 469A.120(1) does not ensure 100 percent recovery of the prudently incurred
17 costs associated with the RPS, but ensures that costs the Joint Utilities incur in complying with
18 the RPS would not be disallowed merely because they may not necessarily be consistent with
19 traditional least-cost utility planning.⁶

20 Second, the legislative history on which the Joint Utilities rely does not show the
21 legislature intended to override the Commission’s traditional ratemaking authority and guarantee
22 100 percent cost recovery for the utilities.⁷ First, the statements that utilities should have “the

23 _____
24 ² Joint Opening Brief of Portland General Electric and Pacific Power 2.

25 ³ Joint Opening Brief of Portland General Electric and Pacific Power 2.

26 ⁴ Joint Opening Brief of Portland General Electric and Pacific Power 2.

⁵ ORS 174.010 (“* * * where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.”).

⁶ Opening Brief of ICNU 3.

⁷ See Joint Opening Brief of Portland General Electric and Pacific Power 2, 9.

1 opportunity to recover [costs to comply with the RPS] if they are prudently incurred”⁸ and that
2 SB 838 “does no harm to the utilities”⁹ do not expressly indicate an intent to limit the
3 Commission’s authority with respect to the particular ratemaking treatment of RPS-related costs.
4 Second, even if these statements did indicate that the witnesses believed SB 838 limited the
5 Commission’s authority to determine the ratemaking treatment of RPS-related NVPC, “the
6 comment of a single legislator at one committee hearing generally is of dubious utility in
7 determining the intent of the legislature in enacting a statute (and the comment of a nonlegislator
8 witness even less helpful) * * *.”¹⁰

9 ORS 469A.120 is silent as to how the Commission should allow utilities to recover RPS-
10 related NVPC in rates. Generally, a court is reluctant to infer a legislative intent to limit the
11 court’s authority from the legislature’s silence.¹¹ This Commission should be reluctant to infer a
12 legislative intent to limit its ratemaking authority. The Commission’s role is to exercise its broad
13 discretion and expertise to decide the appropriate ratemaking of NVPC associated with
14 renewable resources acquired under the RPS, not to dissect ORS 469A.120 for clues as to what
15 type of recovery the legislature may have been contemplating, or would have wanted had it
16 actually considered the question.

17 **B. The Commission has discretion to determine the ratemaking treatment of**
18 **costs the legislature has determined are “recoverable.”**

19 The Joint Utilities concede that costs are “recoverable” if they are “capable of
20 recovery.”¹² The Joint Utilities assert that its RPS-related costs are not capable of recovery if
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23 ⁸ See Joint Opening Brief of Portland General Electric and Pacific Power 2 fn 4 (excerpt of
24 testimony of Senator Lee Beyer to House Committee on Energy and Environment).

25 ⁹ Joint Opening Brief of Portland General Electric and Pacific Power 2 n3 (excerpt of testimony
26 of Jason Eisdorfer to House Committee on Energy and Environment).

¹⁰ *Patton v. Target Corp.*, 349 Or 230, 242, 242 P3d 611 (2010).

¹¹ *State v. Hess*, 342 Or 647, 661 (2007) (“We are reluctant to infer from the legislature’s silence
an intent to deprive the court of its traditional authority * * *”).

¹² Joint Opening Brief of Portland General Electric and Pacific Power 4.

1 they are subject to a deadband, sharing mechanism, and earnings test as they are in the current
2 cost recovery mechanisms.¹³

3 The Joint Utilities' argument equating "capable of recovery" with guaranteed recovery is
4 not well taken. The Oregon Supreme Court considered the definition of "recoverable" in an
5 analogous dispute regarding recovery of attorney fees and costs in an appeal of an order of the
6 Board of Parole and Post-Prison Supervision. In that case, the Court concluded that a statute
7 categorizing certain costs as "recoverable" did not authorize an award of those costs, finding
8 instead that "the phrase 'recoverable costs' in ORS 144.335(12) indicated the legislature's
9 recognition that some other source would authorize the recovery of costs."¹⁴ Similarly, the
10 legislature's decision to categorize all prudently incurred costs associated with compliance with
11 the RPS as "recoverable" does not, in and of itself mean the utility must recover 100 percent of
12 these costs.

13 The Joint Utilities' reliance on the Commission's treatment of other costs the legislature
14 has defined as "recoverable" is misplaced. The Joint Utilities note that the legislature has also
15 specified that utility costs to implement SB 1149 and the Solar Photovoltaic Volumetric
16 Incentive Rate (VIR) Pilot Program are "recoverable," and the Commission has declined to apply
17 sharing mechanisms or an earnings test to these costs.¹⁵ However, costs for the Solar VIR Pilot
18 Program and to implement direct access are different from NVPC. And, it is the nature of the
19 costs that drives the Commission's ratemaking treatment, not the legislature's categorization of
20 them as "recoverable."

21 As discussed in previous orders, the Commission requires the utilities to share some of
22 the variance between actual and forecasted NVPC to incent the utilities to appropriately manage
23 their systems and to allocate business risk.¹⁶ This incentive and allocation of risk are not
24 necessarily appropriate for costs to implement the Solar VIR Program or direct access.

25 ¹³ Joint Opening Brief of Portland General Electric and Pacific Power 4-5.

26 ¹⁴ Blacknall v. Board of Parole and Post-Prison Supervision, 348 Or 131, 141-42 (2009).

¹⁵ Joint Opening Brief of Portland General Electric and Pacific Power 6-7.

¹⁶ See e.g., Order No. 07-015.

