

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

AR 622

In the Matter of

Rulemaking for Community-Based
Renewable Energy Projects.

JOINT SUPPLEMENTAL COMMENTS
OF THE COMMUNITY RENEWABLE
ENERGY ASSOCIATION, THE
RENEWABLE ENERGY COALITION,
AND OREGON SOLAR + STORAGE
INDUSTRIES ASSOCIATION

INTRODUCTION

The Community Renewable Energy Association (“CREA”), the Renewable Energy Coalition (“REC”), and Oregon Solar + Storage Industries Association (“OSSIA”) (collectively the “Renewable Associations”) submit these Joint Supplemental Comments on the Public Utility Commission of Oregon’s (“OPUC” or “Commission”) Notice of Proposed Rulemaking filed September 7, 2021 (“2021 NOPR”) for rules to implement the small-scale renewable project standard in Oregon’s Renewable Portfolio Standard (“RPS”), ORS 469A.210. The Renewable Associations stand by the positions previously asserted in comments submitted on October 13, 2021, and at the public hearing on October 15, 2021. These supplemental comments respond to Portland General Electric Company’s (“PGE’s”) assertions at the public hearing that the Commission lacks authority to adopt administrative rules implementing the small-scale renewables standard under ORS 469A.210. Despite PGE’s assertions, the Commission has authority, and indeed even an affirmative duty, to adopt administrative rules implementing the small-scale renewables standard.

SUPPLEMENTAL COMMENTS

The Commission has authority to adopt rules implementing the small-scale renewables standard in ORS 469A.210. Indeed, as explained below, the applicable statutes affirmatively *require* the Commission to adopt rules implementing the standard.

A. Under Oregon Law, an Agency Has Authority to Adopt Rules Implementing Statutes the Legislature Directs the Agency to Administer.

The Oregon Supreme Court has explained, “rulemaking procedure is to be used in stating general agency policy, ORS 183.310(7).”¹ Additionally, “[w]hen the decision of a concrete case presupposes agency adoption of general standards under which it is to be decided, those standards normally must be adopted by rulemaking procedure before they can be applied in the case.”² However, as with any action, an agency may not adopt rules that exceed its statutory authority.³ The question of whether an agency has rulemaking authority is thus a question of legislative intent as to whether the legislature granted the agency authority over the matter, and if so, whether the legislature has enabled the agency to do so through rulemaking.

In some cases, the legislation requires the agency to act through rulemaking. For example, in *Marbet v. Portland Gen. Elect.*, one provision of the applicable statute, ORS 469.510, directed that the Energy Facility Siting Council “‘adopt safety standards *promulgated as rules* for the operation of all thermal power plants and nuclear installations . . .,’ taking into

¹ *Marbet v. Portland Gen. Elect.*, 277 Or 447, 461, 561 P2d 154 (1977).

² *Id.*

³ *See Oregon Newspaper Publishers Asso. v. Peterson*, 244 Or 116, 123-24, 415 P2d 21 (1966) (holding that statute authorizing the Board of Pharmacy to regulate the practice of pharmacy does not authorize the board to prohibit the advertising of prescription drugs).

account a list of eight considerations.”⁴ Similarly, in *Dinkins v. Bd. of Accountancy*, the Oregon Court of Appeals held that a statute requiring an applicant to have a specified number of years of education or “equivalent thereof satisfactory to the board under its rules” necessitated the adoption of rules in order to implement the statutory requirement and reversed the agency’s decision applying the statutory age requirement to a petitioner in the absence of implementing rules.⁵ In such a case, failure to implement rules will preclude the agency from implementing the legislative policy – entirely frustrating the legislative intent.⁶

In most cases, however, the agency may adopt rules clarifying a statute it is directed to implement even where the statute does not expressly or implicitly require use of rules. In the absence of an express legislative directive, “the tasks the agency is responsible for accomplishing, and the structure by which the agency performs its mandated tasks, all of which are specified in an agency’s authorizing legislation, must be examined as a whole in order to discern the legislature’s intent with regard to rulemaking.”⁷

B. The Commission Has Authority to Adopt Administrative Rules Implementing the Small-Scale Renewable Standard.

In this case, the Commission has authority to adopt administrative rules implementing the

⁴ *Marbet*, 277 Or at 458-59 (quoting ORS 469.510) (emphasis in *Marbet*).

⁵ *Dinkins v. Bd. of Accountancy*, 118 Or App 220, 222-26, 846 P2d 1186 (1993).

⁶ *Id.*; see also *Megdal v. Board of Dental Examiners*, 288 Or 293, 304-21, 605 P2d 273 (1980) (reversing disciplinary action against a dentist for “unprofessional conduct” because legislative policy embodied in that term was incomplete and the relevant statutes implied that rulemaking was required to define the term).

⁷ *Dinkins*, 118 Or App at 224 (quoting *Trebesch v. Employment Division*, 300 Or 264, 270, 710 P2d 136 (1985)); see also *Marbet*, 277 Or at 464 (“Where the act does not itself prescribe that standards must be rules (as it does in 469.500), the choice of procedure is left to the council to make, in the first instance through its own rules of procedure, as long as the purposes we have stated are met.”).

small-scale renewable standard. At the outset, the legislature granted the Commission broad authority to adopt administrative rules with respect to matters within its regulatory purview. The statute governing the Commission’s general authorities provides that the Commission “may adopt and amend reasonable and proper rules and regulations relative to all statutes administered by the commission[.]”⁸ Substantively, the Commission’s regulatory authority is quite broad. Generally speaking, “[t]he Commission is vested with power and jurisdiction to supervise and regulate every public utility . . . in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction.”⁹

With respect to the specific issue here, the Commission is the agency expressly charged with implementing, and ensuring compliance with, the renewable portfolio standards in the Oregon Revised Statutes Chapter 469A, including ORS 469A.210. The statute requires the Commission to perform the following tasks:

- Reviewing and “acknowledge[ing]” the utilities’ implementation plans to meet a “renewable portfolio standard;”¹⁰
- Ensuring the utilities’ costs of compliance do not exceed the statute’s cost cap;¹¹
- Authorizing rate recovery through an automatic adjustment clause for “costs associated with complying with ORS 469A.005 to 469A.210”;¹²
- Establishing a system for allocating renewable energy certificates for multistate

⁸ ORS 756.060.
⁹ ORS 756.040(2).
¹⁰ ORS 469A.075(1), (3).
¹¹ ORS 469A.100.
¹² ORS 469A.120(1).

utilities;¹³

- Reviewing and approving utilities’ compliance reports for a “renewable portfolio standard”;¹⁴
- Establishing alternative compliance rates for utilities subject to a “renewable portfolio standard”;¹⁵ and
- Imposing penalties for noncompliance with a “renewable portfolio standard.”¹⁶

The statute repeatedly includes the small-scale renewable standard in ORS 469A.210 among the list of sections containing “a renewable portfolio standard” – leaving no doubt that the Commission is the agency charged with implementing the small-scale renewable standard.¹⁷

Indeed, the RPS even *requires* the Commission to adopt rules implementing certain key provisions of the RPS, including certain provisions that are the subject of the proposed rulemaking at issue here. The RPS mandates that the Commission “*shall adopt rules*” establishing “the requirements for implementation plans” under the “renewable portfolio standard.”¹⁸ The RPS expressly invokes rulemaking authority in discussing the compliance reports for “a renewable portfolio standard” by stating: “The commission *by rule* may establish

¹³ ORS 469A.150.

¹⁴ ORS 469A.170(1).

¹⁵ ORS 469A.180(1).

¹⁶ ORS 469A.200.

¹⁷ See ORS 469A.010(3) (endorsing hydroelectric energy and referring to ORS 469A.210 as a “renewable portfolio standard”); ORS 469A.140(5) (addressing use of renewable energy certificates to meet a “renewable portfolio standard established under ORS 469A.005 to 469A.210” and another state or federal standard); ORS 469A.200 (addressing penalties for failure to comply with “a renewable portfolio standard under ORS 469A.005 to 469A.210”); ORS 469A.300 (addressing use of hydrogen power stations to comply with “a renewable portfolio standard under ORS 469A.005 to 469A.210”).

¹⁸ ORS 469A.075(1), (4) (emphasis added).

requirements for compliance reports submitted by an electric company or electricity service supplier.”¹⁹ Another statutory provision expressly invokes rulemaking authority of the Commission to account for use of renewable energy certificates by a multistate utility: “The Public Utility Commission *by rule shall establish* a process for allocating the use of renewable energy certificates by an electric company that makes sales of electricity to retail customers in more than one state.”²⁰ While the Renewable Associations have not necessarily agreed with the Commission’s substantive proposal in the latest proposed rules on these subjects, those proposed rules specifically resolve the questions regarding the contents of implementation plans, as well as how compliance will be measured, and how multistate utilities should demonstrate such compliance – each of which are matters expressly delegated for the Commission to determine through rulemaking.

Thus, there is no question that the Commission has the authority, and indeed even an affirmative obligation, to adopt administrative rules clarifying and implementing the small-scale renewables standard because the Commission is the agency charged with implementing that standard, ensuring the utilities comply with it, and penalizing them for non-compliance.

CONCLUSION

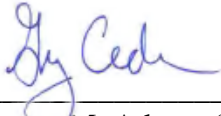
The Renewable Associations appreciate the opportunity to submit these supplemental comments on the small-scale renewable standard. For the reasons set forth above and in our prior comments, the Commission should adopt the important revisions to the proposed rule set as set forth in our comments submitted on October 13, 2021.

¹⁹ ORS 469A.170(1), (3) (emphasis added).

²⁰ ORS 469A.150 (emphasis added).

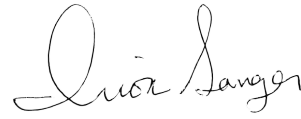
Dated: November 5, 2021.

Respectfully submitted,



Gregory M. Adams (OSB No. 101779)
Richardson Adams, PLLC
515 North 27th Street
Boise, ID 83702
Telephone: 208-938-2236
Fax: 208-938-7904
greg@richardsonadams.com

Of Attorneys for the Community Renewable
Energy Association



Irion Sanger
Sanger Law, PC
4031 SE Hawthorne Blvd.
Portland, OR 97214
Telephone: 503-756-7533
Fax: 503-334-2235
irion@sanger-law.com

Of Attorneys for the Renewable Energy
Coalition and Oregon Solar + Storage
Industries Association