



**NORTHWEST ENVIRONMENTAL DEFENSE CENTER**  
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**October 21, 2021**

**SUBMITTED VIA EMAIL to:** [PUC.FilingCenter@puc.oregon.gov](mailto:PUC.FilingCenter@puc.oregon.gov)

Public Utility Commission of Oregon  
201 High Street SE, Suite 100  
P.O. Box 1088  
Salem, OR 97301

Re: Docket No. AR 648 – Wildfire Mitigation Phase I

Dear Members of the Commission,

The Northwest Environmental Defense Center submits the following comments regarding the Public Utility Commission of Oregon’s (“PUC”) draft rules at Docket No. AR 648. These rules relate to the implementation of 2021 Senate Bill 762, Section 3, which requires public utilities to submit risk-based wildfire protection plans to the PUC.

NEDC is an independent, nonprofit environmental organization established in 1969 by a group of professors, law students, and attorney alumni at Lewis & Clark Law School. The organization’s members include citizens, attorneys, law students, and scientists. NEDC’s mission is to protect the environment and natural resources of the Pacific Northwest by providing legal support to individuals and grassroots organizations with environmental concerns, and by engaging in education, advocacy, and litigation independently and in conjunction with other environmental groups.

## **INTRODUCTION**

Public utilities play an important role in mitigating the risk of wildfires. Transmission lines can ignite fires, and these lines are abundant through forested areas that frequently experience wildfires. The Oregon Legislature passed Senate Bill 762 (SB 762) in 2021, which directs the PUC to promulgate rules concerning wildfire mitigation strategies. The PUC proposed rules 860-300-001, 860-300-0002, 860-300-003, and 860-300-004 in an effort to develop wildfire mitigation strategies. While the PUC generally proposes to adopt the statutory mandates in SB 762 word for word in these rules, NEDC has several concerns with the rulemaking. These concerns include the fact that good cause is undefined in this statute for when the commission can waive the rules, that consumer-owned utilities have undefined compliance deadlines, and that the rules do not implement the penalties for non-compliance. Further, there are significant environmental justice concerns about electric utility wildfire mitigation that this rule does not address. This comment seeks to address all the subsections of the new rules and ensure that this rulemaking complies with the new Oregon statute.

## DISCUSSION

### I. Proposed Rule 860-300-0001

This rule explains the general scope and applicability of the proposed rules. Rule 860-300-001(1) states that the rules describe the filing requirements that a public utility must follow to submit a Wildfire Protection Plan to the PUC. This rule also gives the PUC discretion to waive any of the rules if good cause is shown by a written waiver. The rule contains no specifics regarding what constitutes “good cause,” or what a written waiver needs to include or address in order to show good cause. NEDC recommends that PUC provide clarification as to what it considers good cause. Implementing the rules in the following subsections simply requires a utility to “identify,” “describe,” and “discuss” the issues that may come up for wildfire mitigation. Without any defined good cause exceptions, there does not seem to be any good cause why a utility cannot at the very least create a plan that “identifies,” “describes” and “discusses” measures to mitigate wildfires. NEDC requests that good cause be more thoroughly defined in OAR 860-300-0001.

### II. Proposed Rule 860-300-0002

This rule mirrors SB 762 §3(2)(a-h), essentially adopting the statutory language word for word. While this language may technically comply with the statute, SB 762, Section (3), subsection (7) states that the rules are not limited to the statutory language. Here, PUC is authorized to go further than the statute in defining what the utilities should include in their wildfire mitigation plan but has not done so. PUC should reconsider and revise OAR 860-300-0002 to create more defined goals regarding utilities’ wildfire mitigation plans.

### III. Proposed Rule 860-300-0003

Proposed Rule 860-300-0003 is missing important statutory language. SB 762, Section 4, Subsection (8) directs the PUC to allow all reasonable costs incurred by the implementation of wildfire mitigation plans to be recovered in the rates utilities charge to customers. Further, Subsection (8) states that the commission *shall* establish an automatic adjustment clause or another method to allow timely recovery of costs. This subsection protects utilities by ensuring that they receive timely recovery of costs associated with the wildfire mitigation plan. Ensuring utilities are funded in a timely manner also will benefit ratepayers by providing them with reliable electricity at a reasonable rate. Ultimately, the PUC’s omission of the adjustment clause or other methods of timely recovery is in contravention to their statutory obligations. NEDC recommends that the PUC amend the rule to include the automatic adjustment clause or create another method to allow timely recovery of costs.

### IV. Proposed Rule 860-300-0004

Proposed Rule 860-300-0004 addresses how consumer owned utilities are to come into compliance with the statute. Consumer owned utilities’ (COU) wildfire mitigation plans are addressed by the Oregon legislature in SB762, Section 4. A simple glance at the proposed rule reveals that PUC has missed a clear opportunity to incorporate important rules pursuant to Section 4. Section 4 gives the PUC

broad discretion to implement rules for COUs concerning the creation of wildfire plans, the conducting of wildfire risk assessments, and the submission of such plans. Proposed Rule 860-300-004 does not address these important subsections. Further, SB 762 is simply the floor that the PUC must meet when developing its rules. Pursuant to Section 4, PUC should incorporate additional rule language concerning COU wildfire mitigation plans.

#### **V. The PUC Fails to incorporate SB 762 Section 3a in the proposed rules.**

The proposed rules do not incorporate civil penalties in accordance with the directives of the senate bill. SB 762 Section 3a states that a violation of Section 3 (incorporated in the proposed rule 860-300-0002) is subject to a civil penalty not to exceed \$10,000. See SB 762 Section 3a (1). Further, SB 762 states that the civil penalties *must* be imposed by the Public Utility Commission if there is violation of rules adopted by the PUC. SB 762 (2). While SB 762 does state that the civil penalty shall be imposed as provided in accordance with ORS 183.745, the rules proposed by the PUC lack any penalty provision. This is not compliant with the statute. The PUC's proposed rules therefore must be amended to include the penalty provision.

#### **VI. Environmental Justice Concerns**

The PUC's wildfire mitigation rules raise significant environmental justice concerns, as the proposed rules will create an undue burden on lower income ratepayers. The proposed rule states that all reasonable costs incurred by the public utility will be recoverable in rates from all customers. OAR 86—300-0003. While recovery for prudent investments is a fundamental ingredient to utility regulation as noted above, NEDC is concerned that increases to ratepayer bills will disproportionately affect minority and low-income ratepayers. Oregon is already going through an expansion of utility investments due to the growing demand of power production and a transition to renewable energy power production. *See generally* Oregon House Bill 2021 (mandating Oregon is using 100% clean energy by 2040). While these investments are necessary to achieve the legislature's goals, the impacts of these investments will disproportionately burden minority and low-income ratepayers. The PUC should take this opportunity to ensure that these communities do not shoulder the burden of these rate increases. The PUC can mandate that the wildfire implementation program costs are added to the operating costs of the utility. The rate making formula incentivizes "investments" by utilities by guaranteeing a rate of return, while there is no "rate of return" for operating costs. There is no single formula or combination of formulas that the PUC must use and the PUC is able to make pragmatic adjustments within its statutory authority. *Federal Power Commission v. Natural Gas Pipeline Co. of America*, 315 U.S. 575, 586 (1942).<sup>1</sup> If PUC creates a rule that defines the costs of implementing the wildfire mitigation plan as operational, this will lower costs that ratepayers incur. NEDC asks the PUC to consider adding the costs of implementing the wildfire mitigation program to the operational costs. NEDC further asks the PUC to consider all

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<sup>2</sup> See Stefan H. Krieger, *The Ghost of Regulation Past: Current Application of the Rule Against Retroactive Ratemaking in Public Utility Proceeding*, 1991 U. Ill. L. Rev. 983, 994-95 (1991) (explaining that the ratemaking formula is  $R=B+O$  and rates are set by dividing the revenue requirement, R, by anticipated electricity. The rate base is calculated by multiplying the rate base (B), which is investments that a utility makes, by the rate of return (r) required for the investment then adding operating costs (O)).

environmental justice concerns including but not limited to the costs to low income and minority ratepayers and the effects of wildfires to low-income and vulnerable communities.

## **CONCLUSION**

NEDC believes that the proposed rules do not go far enough to truly address public utilities' obligations related to wildfires in Oregon. The PUC has failed to incorporate several important sections and subsections of SB762 into its proposed rules. These rules should go further to ensure that electric utilities create plans that wildfire mitigation. Rather than copying the statutory language, the PUC should provide utilities a blueprint of meaningful actions that utilities could take to mitigate wildfires. Instead, the PUC rules consistently mandate only a "discussion," a "description," or an "identification" of wildfire mitigation strategy. Wildfires have been particularly devastating for the past several years and are anticipated to get worse, therefore these minimal requirements do not go far enough to mitigate wildfires. Further, the rules do not address the cost that will be incurred by the ratepayers based on the utilities' implementation of the new rules. NEDC respectfully requests that the PUC reconsider OAR 860-300-0001 through OAR 860-300-0004 to create more protective guidelines concerning the development of utilities' wildfire mitigation plans and to more fully consider the costs that will be incurred by ratepayers.

Sincerely,

Dan Polkow and Alyssa Forrest  
NEDC Student Volunteers