BEFORE THE

PUBLIC UTILITY COMMISSION OF OREGON

IN THE MATTER OF PACIFICORP, dba PACIFIC POWER's Application to Reduce the Qualifying Facility Contract Term and Lower the Qualifying Facility Standard Contract Eligibility Cap	)	CASE NO. UM 1734 PRE-HEARING BRIEF OF THE COMMUNITY RENEWABLE ENERGY ASSOCIATION

The Community Renewable Energy Association ("CREA") hereby submits its pre-hearing brief to the Public Utility Commission of Oregon ("OPUC or "Commission") in the above-captioned case. CREA's position in this docket is the same as its position in the recently concluded Phase I of docket UM 1610 and in the ongoing docket UM 1725: (1) the Commission should maintain the eligibility cap at 10 megawatts ("MW") for all qualifying facility ("QF") resource types under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), and (2) the Commission should *increase* the length of the contract term for fixed avoided cost rates to 20 years. As explained below, maintaining the eligibility cap at 10 MW is necessary to provide small QFs an opportunity to sell their output, and a 20-year term of fixed rates is both reasonable and legally required under Oregon law.

I. BACKGROUND

A. The Commission Recently Addressed the Same Issues in Docket UM 1610.

In docket UM 1610, CREA argued that the Commission's policy of maintaining an eligibility cap at 10 MW for all QF resource types was necessary to provide small QFs a meaningful opportunity to sell their output to a utility. UM 1610 CREA/100, Hilderbrand/11-13.

CREA's witness explained that small QFs lack the financial resources prior to contract execution and financial closing to be effective at negotiating rates and contract terms. *Id.* The Commission specifically relied upon the testimony of CREA and others on this point, explaining: "These parties note that a QF developer may only have access to financing after a PPA has been signed; prior to that time, the QF developer may rely only on the developer's own resources. Small QFs under 10 MW may lack the resources to negotiate complex modeling and inputs with a utility." Order No. 14-058 at 7. Relying on these facts, the Commission adjusted the calculation methodologies for standard rates but maintained the eligibility cap at 10 MW for all resource types. *See* Order No. 14-058 at 7-8, 12-15.

CREA also addressed the question of contract length in docket UM 1610. Since 2005, the Commission has required that QFs have the option to enter into contracts with fixed prices for the first 15 years after the operation date, and may receive an un-fixed, market-based price for an additional five years if they elect a 20-year term. Order No. 05-584 at 19-20. In docket UM 1610, utilities sought to shorten the contract term. *See* UM 1610 Idaho Power/200, Stokes/74; UM 1610 PAC/200, Griswold/4-5. CREA opposed shortening the term and instead proposed that the contract terms should be lengthened to 20 years of fixed rates. On this point, CREA's witness explained:

> The current term of 15 years with fixed rate is the absolute minimum that can be financed by a 10 MW project. Preferably, QFs would have the option to obtain fixed rates for at least 20 years. I believe it would be reasonable for the Commission to extend the fixed rate term to 20 years.

UM 1610 CREA/100, Hilderbrand/30. The Commission did not address the issue, and therefore left in place the 15-year term for fixed avoided cost rates.

CREA and several other intervenors expended substantial resources in docket UM 1610. However, unlike the utilities, CREA and other intervenors may not recover the costs incurred in those dockets from ratepayers. CREA had expected that the policies adopted after the extensive process in docket UM 1610 would remain unchanged for a reasonable period of time, but Idaho Power and PacifiCorp almost immediately engaged in a collateral attack upon the two most significant issues from docket UM 1610 upon which the utilities had not prevailed – the eligibility cap and the contract length issues.

B. The Idaho Power Application to Collaterally Up-End Docket UM 1610.

A little over a year after Order No. 14-058 became final, Idaho Power filed an application to lower the eligibility cap to 100 kilowatts ("kW") for wind and solar QFs and to shorten the contract length for non-standard contracts to *two* years. *See* OPUC Docket No. UM 1725. The OPUC granted interim relief to Idaho Power, lowering the eligibility cap for solar QFs to 3 MW, but maintaining the contract term for all QFs at 15 years of fixed rates. Order No. 15-199 at 6-7. Subsequently, Idaho Power revised its proposal with regard to the contract term to request the same relief that it obtained from the Idaho Public Utilities Commission ("Idaho PUC"). Idaho Power/400, Allphin/15. Idaho Power now proposes that as long as the QF continuously enters into successive two-year contracts, the QF is entitled to eventually receive a contract with capacity rates that begin on the capacity deficiency date established at the time of its initial contract. This bizarre proposal was based on an implicit, if not explicit, concession that federal law requires the QFs to be compensated for both energy and capacity, and that a two-year term would never allow the QF to sign a contract of sufficient duration to reach the utility's capacity deficiency period. At the time of the filing of this pre-hearing brief, the Idaho Power docket is fully submitted and awaiting a Commission decision.

C. The PacifiCorp Copy-Cat Application to Collaterally Up-End Docket UM 1610.

Shortly after Idaho Power's filing in docket UM 1725, PacifiCorp followed suit with its own collateral attack on docket UM 1610. PacifiCorp's proposal in this docket is to reduce the fixed-price term of *all* QF contracts from 15 years to three years and to reduce the eligibility cap for standard rates and contracts from 10 MW to 100 kW for solar and wind QFs. Notably, PacifiCorp's proposal is far more sweeping than even Idaho Power's proposal because PacifiCorp proposes to slash the contract length for *all* QFs, both those eligible for standard rates and those eligible only for non-standard rates. After denying a motion to dismiss this proceeding, the Commission granted interim relief to PacifiCorp by lowering the eligibility cap available to solar QF projects to 3 MW. Order No. 15-241 at 2-3.

As with the previous proceedings, the testimony in this proceeding again confirms that lowering the eligibility cap and shortening contract terms will preclude otherwise economic QFs from ever being constructed. CREA/100, Skeahan/2-6. Several parties oppose the reduction to the eligibility cap and contract term. The City of Portland requests rejection of the request because it will frustrate the City's plans to reduce carbon emissions and plans to increase use of small-scale renewable generators. City of Portland/100, Jacob/1-3. The Oregon Department of Energy's ("ODOE") witness explained that PacifiCorp's proposed reduction in contract length would introduce several re-pricing events into the term of a loan for a QF project, raising the price risk beyond the tolerance of most commercial lenders. ODOE/100, Hobbs/2-3.

Undeterred, PacifiCorp makes a number of specious arguments. For example, PacifiCorp's witness, Mr. Bruce Griswold, actually suggests – without any supporting examples

– that QFs will be able to achieve financing based on a three-year contract. PAC/200, Griswold/8. PacifiCorp further suggests that "with the development of new financing vehicles such as 'yieldcos,' new financing structures and opportunities are available." *Id.* However, Mr. Griswold does not describe this new "yeildco" structure. Nor does he provide any explanation of how this new "financing vehicle" is able to allocate scarce capital to small QFs that have a right to sell their output for only a maximum period of three years.

PacifiCorp also presents false comparisons. Mr. Griswold testifies that shortening the length of fixed prices for QF contracts from 15 years to three years is consistent with PacifiCorp's recent decision to shorten its "hedging time horizon" for electricity and natural gas hedges from 48 months to 36 months. PAC/200, Griswold/9. According to Mr. Griswold, therefore, shortening the term of hedging contracts by one year should lead to a shortening of QF contracts by 12 years. In order to scare the Commission, PacifiCorp also compares the nameplate capacity of contracted and proposed QF projects to PacifiCorp's *average* load. PAC/100, Griswold/12. However, PacifiCorp's comparisons overlook that the predominant resource types at issue – wind and solar – have lower capacity factors that make its comparisons of QF nameplate capacity to average load very misleading. CREA/100, Skeahan/8-9.

II. ARGUMENT

The Commission should recognize PacifiCorp's application for what it is – a bold attempt to obtain an administrative repeal of PURPA and related state law. The Commission should reject both of PacifiCorp's proposals on policy grounds alone because a lower eligibility cap and three-year contracts would leave no realistic opportunity for small renewable generators to sell their output in Oregon's monopsony wholesale or monopoly retail electricity markets.

Furthermore, the Commission should reject PacifiCorp's proposal to shorten the contract term because doing so would violate federal and state law. In fact, the Commission should *increase* the period of fixed prices to at least 20 years to bring its policies into compliance with state law.

A. The Commission Should Maintain the 10 MW Eligibility Cap for All QF Resources.

The Federal Energy Regulatory Commission's ("FERC") regulations provide the State of Oregon with discretion to maintain the eligibility cap for standard rates at 10 MW. FERC explained that the purpose of standard rates is to prevent transaction costs from rendering QFs below a certain size threshold uneconomic. *Small Power Prod. and Cogeneration Facilities; Regulations Implementing Sec. 210 of the Pub. Util. Reg. Pol. Act of 1978*, FERC Order No. 69, 45 Fed. Reg. 12,214, 12,223 (Feb. 25, 1980). FERC established a federally mandated minimum level for standard rates of 100 kW, but also specifically delegated states the authority to set the eligibility cap for standard rates at a level above that federally mandated minimum level. 18 C.F.R. § 292.304(c). FERC also allowed states to set different standard rates for different categories of QF resource types to account for supply characteristics of varying technology types. 18 C.F.R. § 292.304(c)(3)(ii).

Oregon law does not set a specific eligibility cap for standard rates, but it strongly indicates the Commission should go beyond the federally mandated minimum requirements of PURPA. Oregon law specifically charges the Commission with implementing policies that will "[i]ncrease the marketability of electric energy produced by qualifying facilities located throughout the state for the benefit of Oregon's citizens" and "[c]reate a settled and uniform institutional climate for qualifying facilities in Oregon." ORS 758.515(3).

PacifiCorp's proposal to lower the cap to the federal minimum of 100 kW for wind and solar QFs would contradict Oregon law. In contradiction to Oregon law, lowering the cap to the bare minimum federal requirement for any class of QFs would *decrease* the marketability of QFs in Oregon and promote an individualized and *non-uniform* institutional climate. *See* ORS 758.515(3). As CREA testified, the primary reason to maintain the eligibility cap is to allow small QFs to "avoid being subject to extremely costly negotiation of avoided cost rates and power purchase agreements . . . ." CREA/100, Skeahan/3. "The small business person or farmer attempting to incorporate a biomass generation project into their facility, or erect several wind turbines on their farm, or add solar panels to the roof of their building generally do not have the expertise or financial resources to negotiate such prices and terms without costly third-party assistance and expense." *Id.* PacifiCorp ignores the undisputed fact that "the QF's eventual revenue stream is very speculative prior to the time of PPA execution[, and its] expenses are 100 percent at risk until the project PPA is executed and construction financing is closed." CREA/100, Skeahan/4. There is no reasonable dispute that lowering the eligibility cap will eliminate opportunities below the level of the cap for all but the most sophisticated developers.

PacifiCorp appears to complain primarily of too much proposed solar power. PAC/200, Griswold/17. Solar has in fact become increasingly cost-competitive since the Commission concluded Phase I of docket UM 1610. However, within PURPA's framework, the appropriate response is not to create institutional barriers to economically viable QFs. The Commission's policy has been to send the correct price signal to QFs by adjusting the avoided cost calculations. *See* Order No. 14-058 at 7-8, 12-15. In Phase I of docket UM 1610, the Commission developed new mechanisms to adjust the standard avoided cost rates more regularly, and also put into place different standard rates for different resource types with varying supply characteristics.

PacifiCorp's rates have in fact now been updated consistent with these policies. CREA/100, Skeahan/6-7. Under Oregon's statutory PURPA framework, it is appropriate to send more accurate, yet still uniform, pricing signals to QFs. In contrast, PacifiCorp's proposal to lower the eligibility cap to 100 kW for wind and solar QFs will simply undermine development of facilities larger than that size. The Commission should reinstate the 10 MW eligibility cap for all QF types.

B. The Commission Should Reject the Proposal to Shorten Contract Terms.

PacifiCorp's proposal to shorten the contract term to three years for all QFs is inconsistent with federal and state law. As explained below, FERC's PURPA rules require the Commission to offer long-term contracts with prices fixed for a period longer than three years, and Oregon's own PURPA statute itself requires that fixed prices be made available for at least 20 years.

1. PacifiCorp's Proposal for Three-Year Contracts Violates Federal Law.

PacifiCorp's proposal for maximum contract terms of only three years would violate FERC's requirement that each QF be provided fixed-price rates for energy and capacity in a long-term contract. As explained below, FERC has consistently interpreted its own rules to entitle QFs to a long-term contract containing fixed prices for energy *and* capacity based on forecasting the purchasing utility's avoided costs. PURPA requires the Commission to implement this requirement. 16 U.S.C. § 824a-3(f). PacifiCorp's proposal for three-year contracts is inconsistent with FERC's rules and must, therefore, be rejected.

a. FERC's Rules Require Long-Term Fixed Rates for Energy and Capacity.

The pertinent provisions of the applicable regulation provides: "*Each* qualifying facility *shall have the option* . . . (2) *To provide* energy *or capacity* pursuant to a legally enforceable obligation for the delivery of energy or capacity *over a specified term*, in which case *the rates* for such purchases *shall*, at the option of the qualifying facility,… *be based on* . . . (ii) The *avoided costs calculated at the time the obligation is incurred*." 18 C.F.R. § 292.304(d)(2)(ii) (emphasis added). This regulation is known as FERC's legally enforceable obligation ("LEO") rule, and its plain language provides *each* QF with the right to a contract or other legally enforceable obligation containing rates for energy and capacity based on avoided costs calculated at the time of the obligation. The LEO rule specifically provides the QF with the option to sell energy and capacity over a "specified term" – meaning that the regulation provides the QF with the option to determine the length of the specified term. *Id*.

Aside from its plain language, the history and purpose of the regulation supports a conclusion that it requires long-term, fixed-price contracts or other legally enforceable obligations. According to FERC's preamble to the LEO rule, "[u]se of the term 'legally enforceable obligation' is intended to prevent a utility from circumventing the requirement that provides capacity credit to the qualifying facility merely by refusing to enter into a contract with the qualifying facility." Order No. 69, 45 Fed. Reg. at, 12,224. The preamble further explains that this rule "enables a qualifying facility to establish a *fixed contract price for its energy and capacity* at the outset of its obligation . . . ." *Id.* (emphasis added). FERC invoked "the need for qualifying facilities to be able to enter into contractual commitments" and "the need for certainty with regard to return on investment in new technologies" that only those long-term commitments could provide. *Id*.

FERC has consistently relied upon its statements in its Order No. 69 in subsequent interpretations. *See Virginia Electric and Power Co*., 151 FERC ¶ 61,038, P 24 (2015) (quoting FERC Order No. 69 and stating, "Section 292.304(d) and the requirement that a QF can sell and a utility must purchase pursuant to a legally enforceable obligation were specifically adopted to prevent utilities from circumventing the requirement of PURPA that utilities purchase energy and capacity from QFs"); *Hydrodynamics Inc.*, 146 FERC ¶ 61,193, P 31 (2014) (same); *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, P 32 (2011) (same); *New York State Electric & Gas Corp.*, 71 FERC ¶ 61,027, 61,115-61,116 (1995) ("[FERC] intended the regulations described above 'to reconcile the requirement that the rates for purchases equal the utilities' avoided cost with the need for [QFs] to be able to enter into contractual commitments based, by necessity, on estimates of future avoided costs.'" (quoting FERC Order No. 69, 45 Fed. Reg. at 12,224)).

In *Hydrodynamics Inc.*, FERC directly stated that a state commission violated the LEO rule where the state's rule "offers the competitive solicitation process as the only means by which a QF greater than 10 MW can obtain *long-term avoided cost rates*." *Hydrodynamics Inc.*, 146 FERC ¶ 61,193 at P 33 (emphasis added). FERC additionally found that a 50-MW cap for purchases from certain QFs violated the LEO rule by prohibiting such QFs from obtaining "forecasted avoided cost rates." *Id.* at P 34. Thus, it is clear that FERC understood, and still understands, the LEO rule as entitling each QF to a long-term contract to sell energy and capacity based on forecasting the purchasing utility's avoided costs at the time the obligation is incurred.

Importantly, even if the regulation were ambiguous on the point, a federal agency's interpretation of its own regulation receives significant deference. *See Decker v. N.W. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013). "[U]nless an alternative reading is compelled by the regulation's plain language or by other indications of the [agency]'s intent at the time of the regulation's promulgation," deference is required. *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 512, 114 S.Ct. 2381 (1994) (deferring to statement of agency intent contained in a regulatory preamble). And "broad deference is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program . . . ." *Id.* (internal quotation omitted). Thus, to the extent there is any ambiguity in the regulation itself, each QF is entitled to a "fixed contract price for its energy *and* capacity at the outset of its obligation" based upon a long-term forecasting of the avoided costs. 45 Fed. Reg. at 12,224 (emphasis added); *see also Hydrodynamics Inc. et al.*, 146 FERC ¶ 61,193 at PP 33-34.

b. PacifiCorp's Proposal for Three-Year Contracts Violates FERC's Rules.

PacifiCorp's proposed three-year contract term is inconsistent with FERC's LEO rule for at least two reasons. First, the three-year limit for new contracts is so short that it completely fails to allow the QF to the exercise the right to sell at long-term, forecasted rates for either energy or capacity. It thus falls far short of implementing FERC's requirement that each QF be provided the option to sell at forecasted avoided cost rates. *See Hydrodynamics Inc. et al.,* 146 FERC ¶ 61,193 at PP 33-34.

Second, although the three-year term may allow for short-term, fixed-price compensation for energy limited to three years, the three-year term will allow for *no* fixed-price compensation for capacity. PacifiCorp's current Schedule 37 contains no capacity compensation for QFs opting for renewable or non-renewable rates until 2024.[1] Even if the QF signing a contract in 2016 exercised its right to select a commercial operation date three years later in 2019, that QF would still only receive three years of fixed prices through 2022 – two years prior to the time that the QF would be compensated for capacity. The prospective QF will therefore be deprived of a "fixed contract price for its energy *and* capacity at the outset of its obligation" because a three-year contract will not provide a price for capacity that is fixed at this time. 45 Fed. Reg. at 12,224 (emphasis added). The utility will thus evade the requirement to provide a capacity credit to the QF "merely by refusing to enter into a contract" of sufficient length to provide such credit to the QF. *Id*.

In sum, the Commission cannot adopt a maximum contract term of three years because three-year terms would result in a state implementation plan that is not "reasonably designed to give effect to FERC's rules." *FERC v. Mississippi*, 456 U.S. 742, 751, 102 S.Ct. 2126 (1982). The Commission should reject PacifiCorp's proposal because it violates PURPA.

2. State Law Requires Fixed Rates for At Least 20 Years.

Oregon's own statute implementing PURPA requires the Commission to provide fixed prices for a period of at least 20 years. *See* ORS 758.525. When it enacted this statute shortly after PURPA in 1983, Oregon's legislative assembly specifically intended to provide Oregon QFs with rights greater than those provided by FERC's rules alone – including the right to elect

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[1] Available online at: https://www.pacificpower.net/content/dam/pacific_power/doc/About_Us/Rates_Regulation/Oregon/Approved_Tariffs/PURPA_Power_Source_Agreement/Schedule_37_Avoided_Cost_Purchases_From_Qualifying_Facilities_of_10000_kW_or_Less.pdf.

to sell at fixed prices for at least 20 years. Under the correct application of Oregon's rules of statutory interpretation, the statute unquestionably requires the Commission to provide fixed prices for a period of at least 20 years. Therefore, the Commission should reject PacifiCorp's proposal and extend the period for which fixed prices are made available from 15 years to 20 years.

a. Oregon's Rules of Statutory Interpretation Require Consideration of the Legislative Intent and History.

In 1993, the Oregon Supreme Court issued its watershed case, *PGE v. BOLI*, 317 Or. 606, 859 P.2d 1143 (Or. 1993), where it announced a three-part test for all statutory questions. First, *PGE* instructed courts to consider only the statutory text and the "textual canons" of construction. 317 Or. at 610-12. Second, and only if ambiguity remained after the first step, courts could consult legislative history. *Id.* Third, and only if ambiguity still remained after the first two steps, courts could consider general maxims of construction. *Id.*

In 2009, the Oregon Supreme Court modified the *PGE* methodology in *State v. Gaines*, 346 Or. 160, 206 P.3d 1042 (Or. 2009). In *Gaines*, the court removed *PGE*'s prohibition on consulting legislative history even when the text was clear, but retained *PGE*'s stricter prohibition on consultation of substantive canons. 346 Or. at 172. Thus, "a party is free to proffer legislative history to the court, and the court will consult it after examining text and context, even if the court does not perceive an ambiguity in the statute's text, where that legislative history appears useful to the court's analysis." *Id.* Legislative history cannot overcome statutory text that truly has only one meaning. *Id.* But the court explained that "a party also may use legislative history to attempt to convince a court that superficially clear language actually is not so plain at all – that is, that there is a kind of latent ambiguity in the statute." *Id.*

Additionally, the courts will not defer to an Oregon agency's interpretation unless the statute expressly uses "delegative" terms, such as "good cause," "fair," "undue," "unreasonable," and "public convenience and necessity." *Or. Occupational Safety & Health Div. v. CBI Services, Inc.*, 356 Or. 577, 585, 341 P.3d 701 (2014). Where the terms are merely "inexact" or incomplete, the courts do not defer to the agency's interpretation. *Id.*

b. Oregon's PURPA Statute Requires Fixed Prices for At Least 20 Years.

Under the *Gaines* test, ORS 758.525 requires the Commission to offer QFs the option to enter into contracts containing fixed prices for at least 20 years. Although the statutory language may itself be somewhat inexact, the legislative history clearly demonstrates the statutory intent to provide each QF with the option to enter into a contract with fixed prices for a term of at least 20 years.

Under the first step of the *Gaines* test, the Commission must consider the text and context of the statute. *Gaines*, 346 Or. at 164. The statutory language applicable here provides:

> (1) At least once every two years each electric utility shall prepare, publish and file with the Public Utility Commission a schedule of avoided costs equaling the utility's forecasted incremental cost of electric resources over *at least the next 20 years*. *Prices* contained *in the schedules* filed by public utilities *shall be reviewed and approved by the commission*.
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> (2) An electric utility shall offer to purchase energy or energy and capacity whether delivered directly or indirectly from a qualifying facility. Except as provided in subsection (3) of this section, the price for such a purchase shall not be less than the utility's avoided costs. *At the option of the qualifying facility*, exercised before beginning delivery of the energy or energy and capacity, *such prices may be based on*:
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> > (a) The avoided costs calculated at the time of delivery; or

> (b) The projected avoided costs calculated at the time the legal obligation to purchase the energy or energy and capacity is incurred.

ORS 758.525 (emphasis added).

Thus, the statutory text provides that the utility must provide price schedules setting forth forecasted prices for at least 20 years, and the QF then has the option to select those projected avoided costs as the prices to be included in its contract. Indeed, there would be little reason to require a 20-year price schedule if the prices were not actually available for 20 years.

The context in which the legislature enacted this statutory provision further supports the intent to entitle QFs to forecasted rates for a 20-year term. *See Gaines*, 346 Or. at 164 (first step is to examine the "text *and context* of the statute" (emphasis added)). Oregon's legislature was not writing on a blank slate. FERC's LEO rule already provided that each QF is federally entitled to obligate itself to forecasted rates for energy and capacity over a "specified term." 18 C.F.R. § 292.304(d)(2)(ii). The Oregon law therefore provided additional clarity on an important point – that the specified term of forecasted rates must be *at least 20 years.*

Under the second step of the *Gaines* test, the Commission must also consider the legislative history, which itself confirms that the law requires contracts with fixed prices for a period of at least 20 years. The statute originated as House Bill 2320 ("H.B. 2320") in the 1983 legislative session. On June 15, 1983, after the House of Representatives had passed the bill, the House sponsor of H.B. 2320, Representative William Bradbury, described the purpose of the legislation, in pertinent part, to the Senate Committee on Energy and Environment as follows:

> Basically this bill requires two things of utilities that are not presently required under federal law. The first requirement is that utilities must make a good faith effort to wheel power if they are not willing to pay a price that is acceptable to the small

> power producer. You often times will find that the avoided cost for a public utility, like a coop or a municipality or a PUD will be considerably lower than an avoided cost for a privately owned utility because the publicly owned utilities are preference customers to Bonneville and their avoided cost right now is about 1.8 cents per kilowatt. The avoided cost for private power companies is around 4 to 6 cents per kilowatt. . . .
>
> *The other thing the bill requires that the federal law does not require is that utilities, all utilities, must forecast their avoided cost <u>over a 20 year period</u>* looking out into the future. *And they have to be willing to enter into contract with power producers <u>based on those forecasted avoided costs</u>.*
>
> So those are the two things the bill does that go beyond federal law. You have to make a good faith effort to wheel and *<u>you have to forecast your avoided cost into the future and enter into contracts based on that forecast</u>.* It is not a huge step forward in terms of encouraging small power producers but it is an important step forward, and it is one that will help stabilize the market for small power producers in the state.

Audio Recording, Senate Committee on Energy and Environment, H.B. 2320, June 15, 1983, Tape 168, Side A (comments of Representative William Bradbury).

At the same hearing, the vice chair of the Senate Committee on Energy and Environment, Senator Steven Starkovich, also referred the committee members to ODOE's written testimony for a section-by-section description of H.B. 2320. *Id.* (comments of Senator Steven Starkovich). ODOE's written testimony explained:

> The provisions in the Bill are generally consistent with federal law. In two areas, HB 2320 goes beyond federal law: *it requires avoided costs to be forecasted and, if desired by the facility owner, obligated under contract for at least the next twenty years*, and it encourages reasonable wheeling policies.

Testimony, Senate Committee on Energy and Environment, June 15, 1983, Ex. B at 3 (Statement of David Philbrick, ODOE) (emphasis added).[2] ODOE's written testimony further explained this

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[2] The minutes and exhibits of the June 15, 1983 hearing are attached to this brief. The minutes contain a summary of the statements of Senator Starkovich and Representative Bradbury at this hearing. Minutes, Senate Committee on Energy and Environment, June 15, 1983. ODOE's written testimony is contained as an exhibit to the attached minutes, and ODOE's live comments are contained in Side A of

right to forecasted rates "is important for giving the developer the ability to anticipate whether or not they will have sufficient revenues to repay the loan" to construct the facility. *Id.* at 2. The 1983 legislative assembly subsequently enacted the requirement to provide 20 years of fixed prices, which remains in effect today in ORS 758.525.

Applying the first two steps of the *Gaines* test, the statutory text, context, and the accompanying legislative history conclusively demonstrate that the intent of the legislation – indeed, one of its two purposes – was to provide long-term rates with fixed prices available for at least 20 years. Oregon's legislative assembly recognized that federal law may not require 20-years of fixed prices. And it specifically intended to encourage QFs in Oregon by providing 20-year pricing, along with the opportunity to wheel energy out of the rural parts of the state where the interconnected utility's avoided costs might be lower than those of utilities like PacifiCorp and Portland General Electric Company.

In fact, the Commission's own contemporaneous interpretation of the legislation in 1984 confirms that 20 years of fixed pricing is the *minimum* length the statute requires. In a 1984 order, the Commission interpreted the statutory requirement for a 20-year schedule of rates as requiring a 20-year term because it explained the "payment schedule determines the prices the utility will pay for resources offered to the utility at any time during the period for which the prices are determined." Order No. 84-720 at 5. The Commission plainly stated that the statute's 20-year requirement "is a *minimum* requirement for the utility." *Id.* at 6 (emphasis added). At

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Tape 169 from the same hearing. The audio recording is available at the Secretary of State's Archives Division.

that time, the Commission exercised its discretion to provide forecasted rates for a longer term of 35 years. *Id.* at 6-8.

While the Commission has set minimum fixed-price terms of less than 20 years during periods of time since enactment of the statute in 1983, none of the prior orders appear to have considered the legislative history or applied the *Gaines* test to the statutory interpretation. *See* Order No. 05-584 at 7-10 (discussing prior Commission PURPA orders). In any event, any contrary determinations that may exist in Commission orders issued over the years are not controlling because the statutory terms are not "delegative." *Or. Occupational Safety & Health Div.*, 356 Or. at 585.

In docket UM 1725, Commission Staff argued that ORS 758.525 provides the Commission with discretion to set the contract term at a length shorter than 20 years. According to Staff, the statute contains no express "limitation on the Commission's authority to determine contract length," and therefore it necessarily follows that the Commission has complete discretion to set a contract length as short as it chooses. *See Staff's Post-Hearing Brief*, OPUC Docket No. UM 1725, at 4 (filed Dec. 10, 2015). CREA respectfully disagrees.

The Oregon Court of Appeals recently rejected a very similar argument made by ODOE. *See SIF Energy, LLC v. Dept. of Energy*, 275 Or. App. 809, ___ P.3d ___ (2015). In *SIF Energy, LLC*, ODOE argued that the legislature impliedly granted ODOE discretion to implement the business energy tax credit statute in its chosen manner so long as ODOE did not violate any express prohibition in the statute. *Id.*, 275 Or. App. at 817. ODOE's argument was conceptually identical to Staff's argument that CREA must provide "convincing evidence that the legislature intended to limit the Commission's authority" and identify a "clear statement that House Bill

2320 prohibits the Commission from specifying a PURPA contract period of less than 20 years . . . ." *Staff's Post-Hearing Brief*, OPUC Docket No. UM 1725, at 4, 5. However, the court rejected this premise in *SIF Energy, LLC* because the correct question is whether the legislature unambiguously *granted* the agency the authority it claims to possess. *Id.* (holding ODOE's argument improperly "inverts the presumption that agencies do not have authority unless statutorily provided"). The court further rejected ODOE's attempt to rely on its general rulemaking authority because "that general rulemaking authority is not a grant of discretion to adopt rules contrary to the statutory text." *Id.* at 817-18 n.4. The court further explained that "the legislature's failure to unambiguously state that the agency *must* do something does not necessarily imply that its intent was that the agency *may* do it." *Id.* at 818 (emphasis in original). The court ultimately relied upon the legislative history, including the statute's purpose, to confirm its reading of the statutory text and reject ODOE's reading. *Id.* at 819-23.

Staff's position cannot be squared with *SIF Energy, LLC* and Oregon's rules of statutory construction. The "ultimate goal is to discern the legislature's intent and, to the extent possible, give effect to that intent." *Id.* at 816. In this case, the legislative intent is plainly stated by the House Sponsor of H.B. 2320 to the Senate Committee that subsequently enacted the legislation – that it entitles QFs to at least a 20-year term of forecasted avoided cost rates.

Staff attempts to create ambiguities in Representative Bradbury's statements and argues that he only explained the 20-year term requirement to the Senate and not the House. But Staff is grasping at straws. Representative Bradbury had already spent months engaging in meetings and debates that developed H.B. 2320 in the House, where he also sponsored the bill, and his explanation to the Senate therefore reflected the House's intent behind the bill. *See State v.*

Kelly, 229 Or. App. 461, 467, 211 P.3d 932 (2009) (when considering statements of an individual legislator, "the weight accorded often depends on whether the legislator is the author, sponsor, or carrier of a bill or in some other leadership position"). The legislative intent is further confirmed by the description of the proposed legislation to the Senate by ODOE's witness, and Staff concedes that the "testimony of ODOE cited by CREA does state that House Bill 2320 imposes a requirement on utilities to enter into contracts with 20-year terms." *Staff's Post-Hearing Brief*, OPUC Docket No. UM 1725, at 7. ODOE's witness, like Representative Bradbury, was involved in developing the bill from its inception in the House, and his unambiguous statement confirms the understanding of the intent of the final language that emerged from the House. *See Kelly*, 222 Or. App. at 467 (courts accord weight to non-legislator witnesses who propose legislation and are in a good position to describe its purpose).

In short, there is no reasonable dispute that the purpose of H.B. 2320 was to go above and beyond the bare minimum requirements of federal law by providing QFs with the right to forecasted rates for a period of at least 20 years. Therefore, the statute and its legislative history require fixed prices for at least 20 years.

c. State Law Requires the Commission to Increase the Term of Fixed Prices to 20 Years.

Even if PacifiCorp's proposal for three-year contracts could somehow comply with FERC's rules, Oregon's PURPA statute requires the Commission to do more than provide Oregon QFs with the bare minimum options provided by FERC's rules. Because ORS 758.525 requires the Commission to provide fixed prices for terms of at least 20 years, the Commission must reject PacifiCorp's proposal for three-year terms. In fact, the law requires the Commission to extend term for which fixed prices are made available for all QFs from 15 years to 20 years.

III. CONCLUSION

For the reasons set forth above, the Commission should maintain the eligibility cap at 10 MW for all resource types, and the Commission should increase the length of the contract term for fixed avoided cost rates to 20 years.

RESPECTFULLY SUBMITTED this 5th day of January, 2015.

RICHARDSON ADAMS, PLLC

/s/ *Gregory M. Adams*

____
Gregory M. Adams (OSB No. 101779)
Of Attorneys for the Community Renewable Energy Association

ATTACHMENT 1
Legislative History Minutes

SENATE COMMITTEE

ON

ENERGY AND ENVIRONMENT

CHAIR: SEN JOHN KITZHABER
VICE: SEN STEVEN STARKOVICH

STAFF: TODD SADLO, ADMINISTRATOR
ELIZABETH WRIGHT, ASSIST.
KEVIN PORTER, RESEARCH

MEMBERS: SEN L. B. DAY
SEN JOYCE COHEN
SEN JEANNETTE HAMBY
SEN ROD MONROE
SEN FRED HEARD

WEDNESDAY; 3:30 to 7:00 pm
15 JUNE 1983
Hearing Room 343

Tapes 168, 169, 170 and 171
STATE CAPITOL BUILDING

SUBJECT:

HB 2606 - Authorizes Director or Division of State Lands to provide exemption from permit for emergency fill or removal on state waters for highway authorities. Authorizes division to issue multiple-year permits for fills and removals.

HB 2320 A-Engrossed - Requires public utility to offer to purchase, and to make good faith effort to transmit energy produced by cogeneration facility or small power production facility. Other provisions.

HB 2321 - Relating to energy - Establishes requirements for alternative energy device certification.

HB 2295 - Relating to land use.

TAPE 168 A

023 SENATOR JOHN KITZHABER called the meeting to order at 3:40 pm. HB 2295 -- Today we will go over the appeals process, on Friday, the local process and Monday and Wednesday will be completely devoted to HB 2295. On Monday we will do post-acknowledgement and acknowledgement and Wednesday includes economic development portions and other amendments.

043 SENATOR DAY: Regarding SB 318 with deals with ex parte contact we will add an amendment keeping LUBA alive so we don't work in a vacuum. The bill has not been called up for a hearing but we've asked that a hearing be held immediately and that be done.

049 SENATOR KITZHABER: We will start with HB 2320.

054 STEVEN HOLGATE explains the bill. It regards statutes

TAPE 168 A

purchased by utilities of energy from cogeneration facilities and small power production facilities that are not utilities-present statutes sunset on July 1st. The bill creates a couple of new definitions for index rate and qualifying facility and makes some distinction between non-regulated utilities and public utilities. It declares that Oregon should develop a diversity of energy resources at reasonable rates and with provision to encourage qualifying facilities in Section 2. It also would require that all electric utilities file with the Commissioner a 20 year projection of anticipated avoided costs. (See Section 3).

099 REP WILLIAM BRADBURY, DISTRICT 48: HB 2320 is the product of 4 months of Sub-committee work in the Environment & Engery Committee in the House. When the bill came out of the house it had the support of all the publically owned utilities, the privately owned utilities. It was passed out of committee by unanimous vote. It was a major compromise in terms of working with the various parties. The purpose of the bill is to help small power producers or co-generators market their power at a fair price. Federal law has provided since 1978 that utilities have to pay avoided cost to qualifying facilities. They have to pay the cost they avoid by not having to build another plant but by instead buying the small operators or cogenerators power. There are many changes in the federal law and there are many court challenges related to federal law. It is the desire of the House to provide a fairly settled climate for the development of this power. Basically this bill requires two things of utilities not presently required under federal law. It requires utilities to make a good faith effort to wheel power if they are not willing to pay a price that is acceptable to the small power producer. The avoided cost for a public utility, like a coop or a municipality or a PUD will be considerably lower than an avoided cost for a privately owned utility because the publicly owned utilities are preference customers to Bonneville and their avoided cost right now is about 1.8¢ per kilowatt. The avoid cost for private power companies is around 4 to 6 cents per kilowatt. The utility must publish a rate schedule for wheeling that is based on the cost of transmitting that power. It cannot be based on anything beyond the cost of actually transmitting that power.

The second thing the bill requires that the federal law does not require is that utilities must forecast their avoided cost over a 20 year period. They have to be willing to enter into contract with power producers based on those forecasted avoided costs. Those are the two things the bill does beyond federal law. It is not a huge step forward in terms of encouraging small power producers but it is an important step forward and it will help state-wide.

I have had some amendments drafted. One concern has been over Oregon Law 543.610 which provides that a municipality can basically takeover a private power producers facilities by sending them two years in advance a notice and then taking it over and paying them their net depreciation value for the project. There has been a good deal of concern about that. We propose an amendment that you will find at the bottom of HB 2320-A (6) amendments, subsection 3 which simply says the provisions of the municipal takeover do not apply to a small power production facility with a capacity of two megawatts or less. You basically exempt small power producers from the municipal preference clause contained in ORS 543.610.

170 SENATOR KITZHABER: Bill, did you receive testimoney that municipalities have in fact taken over facilities of this size? Or is it more the perception of the threat?

173 WILLIAM BRADBURY: It is the perception of the threat, there has been no takeover by any municipality under ORS 543.610 to date since the law was enacted. The only case that is presently underway is between the Emerald People's

TAPE 168 A

Utility District and PP & L related to the project.

182 SENATOR DAY: Do you think by placing that amendment you will get non-partisan support toward that effort?

185 REP WILLIAM BRADBURY: The bill at this point in time has passed the House by almost unanimous vote.

186 SENATOR DAY: Do you think you would have 100% support from the Energy & Environment Committee in the House if these amendments were over there?

187 WILLIAM BRADBURY: For the exemption amendments? I couldn't speak for the House committee. It is a fairly controversial issue in the house.

192 SENATOR DAY: My observation is that if you include those amendments this bill will be in trouble.

194 WILLIAM BRADBURY: It is my understanding that there would be some opposition to the bill if those amendments were included from the public utilities. It is my understanding that they would offer to this committee some kind of thing to provide resolutions from their various boards stating that they did not intend to condemn these kinds of small projects. It is really a lot more trouble than it is worth to go after small power producers.

202 SENATOR DAY: Some of us wonder why they should have the authority to do it period. Unless they fail to serve. Some of us are worried about the whole concept in the current law.

208 WILLIAM BRADBURY: I personally do not share your concern Senator Day but that's another matter.

220 H. H. BURKITT, H. H. BURKITT PROJECT MANAGEMENT, INC.: testified in favor of the Bill. (See EXHIBIT "A" for testimony.)

430 DAVID PHILBRICK, OREGON DEPARTMENT OF ENERGY: Testified in favor of HB 2320 (See EXHIBIT "B" for testimony.)

TAPE 169 A

093 JUDITH MILLER, CENTRAL LINCOLN PUD; LIBBY HENRY, EUGENE WATER AND ELECTRIC BOARD: Testified in favor of HB 2320. (See EXHIBIT "C" for written testimony.)

230 TEACE ADAMS, ENERGY CONTROL SYSTEMS: Testified in favor of the bill. (See EXHIBIT "D" for testimony.)

485 THOMAS NELSON, PACIFIC POWER AND LIGHT CO.: Testified on the bill. (See EXHIBIT "E".) I believe that the bill as it is presented to you is an intelligent solution to a whole host of difficult problems that were faced by the Committee and the parties involved. The proposed amendments to HB 2320 deals with the provision of ORS 543.610 which is actually a provision out of the Oregon State Water Resources Act. The provision as it is setforth on the proposed amendment provides

TAPE 168 B

that any municipality or the state may upon two notice in writing, take over an operate any state licensed hydro-electric project upon the payment of original cost depreciated, which in the terms of the statute is net investment and that term is defined under the definition section to say original cost less depreciation. That particular section is troublesome. Note first that it says any municipality. That means precisely that. It need not have its own distribution center to takeover a production facility and for that matter need not have a distribution system to takeover the facility from an investor-owned or other utility. This provision is the concept that is reflected in the Merwin Dam situation. It is located on the north fork of the Lewis River in Washington State and is owned by the Pacific Power and Light Company. It is now in relicensing proceedings before the Federal Energy Regulatory Commission in Washington, D.C. The license for the dam has expired and under the federal act they have a preference for relicensing. They further claim that under the federal act they need pay only the original depreciated cost of the project. That is currently estimated to be 9 million dollars. The replacement value of the facility, in order to get equivalent energy over the next 50 years, which we believe Merwin would provide, would cost in 1988 dollars 832 million dollars. Basically, we have a trade of 9 million cost of replacement energy for the period of Merwin power 832 million.

I hope that raises in your mind a problem of what is quite candidly rate-payer impact. That situation could resound to the detriment of the state's rate-payers particularly those rate-payers that are on systems served by the utility that happens to own the dam which is subject to an original cost less depreciation take-over. Should PP & L lose Merwin Dam it would raise our rates commercial and industrial rates by approximately 10%. Should we lose most of our major dams in Washington and Oregon it would raise our commercial and industrial rates by 50%. We realize that there is a claim by public power that they have a preferred status when it comes to hydropower and we can see that preferred status. They do have preference on initial licensing and they claim preference on relicensing, which is a contested issue now before the Supreme Court of the United States. 40% of the regions customers are served by Bonneville preference entities, excluding investor owned utilities. 85% of the region's hydroelectric power is now owned by Bonneville directly, and available through the preference clause to PUD's, communities and co-op's or alternatively owned directly by the PUD's themselves. We propose that this bill be amended to repeal ORS 543.610 which provides take-over two years notice need not be a entity with a distributing system. We propose that this provision be deleted. By doing so you would not effect the existing preference rights of public bodies to preference from the Bonneville Power Administration under both the Bonneville Preference Act and the regional act, or the existing preference to public bodies municipalities to develop new hydro-electric sites or perhaps to those sites on relicensing. Finally, it has been stated that there is no threat under 543.610. Why are we doing this? The Opposite is the case. I 'd like to pass out a letter PP & L received almost two years ago. (See EXHIBIT "E".)

150 SENATOR KIZHABER: Closes the hearing on HB 2320 and opens the hearing on HB 2321.

164 STEVEN HOLGATE: HB 2321 deals with certification of systems and dealers for saleable alternative energy. Purchasers of the devices may not have enough protection against unfounded dealer claims or the fradulent dealer actions. Presently all alternative energy devices must receive a final certification in order to qualify for tax credits. In addition any devices sold and installed by uncertified dealer must also receive preliminary certification. In addition, present law inadvertently gives certain incentives to dealers to remain uncertified.

299 SENATOR KITZHABER: I MOVE also the amendments HB 2556-6 which are the amendments agreed upon by the Oregon Troll Commission and Gill Netters represented by Ted Bugas. Is there objection to the adoption of those amendments? SO ORDERED. I then MOVE AMENDED HB 2556 to the Floor with a Do Pass Recommendation. Clerk will call the roll.

309	SEN DAY		NO
	SEN COHEN		AYE
	SEN HAMBY	MOTION CARRIES	NO
	SEN MONROE	Sen. Kitzhaber to Carry	AYE
	SEN STARKOVICH	the Bill on the Floor.	AYE
	SEN KITZHABER		AYE

313 SEN DAY: I serve notice of the Minority Report and Senator Hamby has agreed to join me.

318 SEN. KITZHABER: I will open the work session on HB 2662.

333 REP. D.E. JONES: This bill puts corporations under the same statutes that districts are under. This would but it under the same provisions that an irrigation district is under and allow them to withhold the water until they have paid their assessment fees. This amendment is with the consent of the original sponsors of the bill.

361 SENATOR KITZHABER: Thank you, we'll get this out for you this week. Close the hearing on HB 2662. We'll open the Work Session on HB 2320. I understand you have some amendments Senator Day.

369 SENATOR DAY: I have two sets of amendments, the one I want to discuss is 2320 A-7. I have a new set I want to pass out 2320A-8. I withdraw 7 and I want to do 8. (SEE EXHIBIT "E".) It is not fair to no address the statute .610. It amounts to confiscation of property without compensation.

425 DICK BROWN, PACIFIC POWER AND LIGHT COMPANY: ORS 543.610 allows for the state or municipality to offer two years notice to someone having a licensed project and after the two year notice being able to take-over that project at the original cost less depreciation. We want to repeal that entire section because we feel it is unfair and is being used against our company at the present time on the Umpqua River. We didn't have the votes to repeal the entire section. We still feel it is unfair and if you cannot see your way clear to repeal the section by replacing this amendment to 2320 we would hope you would repeal portions of the ORS that does not exceed the net investment as defined in ORS 543.010 and "the net investment shall be determined in accordance with the provisions of ORS 543.010 to 543.620. These provisions say that the compensation would be the net investment less depreciation. We hope you can see your way clear to vote for this amendment.

485 SENATOR DAY: I am going to move the -8 amendments when you are ready for the question.

488 SENATOR KITZHABER: Mr. Brown do you feel there is some value to the bill itself?

489 MR. BROWN: Yes.

TAPE 187 B

021 SENATOR KITZHABER: You were part of the group that worked out a fairly delicate compromise on the House side. (answers yes.) What do you think the impact of these amendments is going to have on that compromise?

023 MR. BROWN: We hope that it will not impact the compromise. We don't want to in anyway jepordize the bill.

026 SENATOR KITZHABER: Do you think the PUD's will be happy about these amendments?

027 MR. BROWN: I can't speak for the PUD's.

028 SENATOR KITZHABER: I think there is some merit at looking at that chapter. But I am concerned about the issue that has been worked out in the bill. That is a political judgement and not a policy judgement. That is one of my concerns.

032 SENATOR STARKOVICH: This is the one area of public power law that has always bothered me the most. We are not talking about a fair market value. I don't think that it is fair. In the context of the bill, I don't know if the bill would survive. I like the bill as it is. Can we gut another bill?

043 SENATOR DAY: I think the bill will pass because the issue has been aggregated even further with the default of the WOOPS and the very real threat of some of this occuring is there. I think we have to draw this issue and I think there is support on it. We aren't outlawing condemnation but are trying to put condemnation on just compensation level. That's a fair proposal and the threat of that is wrong. It would surely impact the rates if they can do it. I feel strongly about the issue. I think we can sell it in both houses of the legislature because it is fair.

064 MR. BROWN: We have small scale generators that are interested in doing what the direction of 2320 takes them. With this on the books it is going to be very difficult for them to get financing for development. We are encouraging it in one way and discouraging it by not doing something about the ORS in another way.

071 SEN. KITZHABER: Has this statute ever been used successfully in this state?

072 MR. BROWN: No sir, not that I am aware of.

080 JAN BOETTCHER, EXEC. DIRECTOR OF THE NORTHWEST SMALL HYDROELECTRIC ASSOC. (See EXHIBIT "F" for testimony.) Supports the amendments to HB 2320.

110 SENATOR KITZHABHER: This statute has been on the books for a long time. How did people get financing up to this time. How has the statute been a disincentive up to this time?

114 JAN BOETTCHER: The statute has never been used. I understand also that the statute is probably unconstitutional and that maybe why they did not use it. Also small hydro was not cost effective until 3 or 4 years ago when the power rates started rising and people started using these projects. I hope you will adopt Sen. Day's amendments.

122 JACK FULTZ: I owned land on the Deschutes River for 20 years in Bend, Or. The land was purchased for $10,000. I want to develop a small hydro site there and I've spent 4 years and over $80,000 to obtain the necessary licenses. My site is the most environmentally sound of those on the river. The value of the land alone is about one-half a million dollars because since the time I purchased it it is in a commercial zone. I could lose all of it if this is not repealed for the price I paid for it. Oregonians would lose. Oregonians would lose the initiative I and others are willing to spend to develop hydro sites. No one will put forth the effort to develop the site if the efforts can be lost on two years notice and payment of the original cost less depreciation. Taxing bodies could lose. If a project is taken over by a tax exempt municipal body such as the City of Antelope. Antelope could step in and take my unit. I anticipate paying about $60,000 in property taxes alone to Deschutes County and the city of Bend. Finally, the rate payers would have to pay more for the power to replace that from the lost project. If they take my project they will sell their power to the same people that I sell it to. However, they put no money back in -- they pay no taxes on it. It is an unfair bill and I hope you will help us to get it repealed.

163 JUDITH MILLER, REPRESENTING CENTRAL LINCOLN PEOPLE'S UTILITY DISTRICT: I have not discussed the amendments with my people and I am not prepared to say that we could look favorably on this amendment. We have worked very hard on this piece of legislation for a long time. My sense is that the Board of Directors would not support these changes. There have never been any moves to takeover any hydroelectric project and I don't think they ever will.

193 SENATOR DAY: The legislature is faced with entitling the private owner with a reasonable return on their investment and not confiscation with out compensation. I can understand that the public entity might be able to do a better job but to suggest that under .610 it never has been done but it hasn't been done for a lot of reasons. Hydro is now more cost effective.

216 JUDITH MILLER: Senator Day, perhaps you would be interested in reading the resolution that the Emerald People's Utility District did pass by their Board of Directors. It is available to you. It might relieve you of your concerns regarding small power producers.

235 LIBBY HENRY, We have never condemned anyone's facility and for Senator Day's benefit, we've had enough trouble trying to build our own facilities let alone trying to condemn someone elses.

253 SENATOR DAY: I MOVE THE AMENDMENTS DATED 6/24/83 to HB 2320A-8 as identified with my name on it.

257 SENATOR KITZHABER: Senator Day has moved his amendments. Is there discussion.

260 SENATOR DAY: I think this is more serious than we realize and what the amendments accomplish is right. I think they should go into the normal condemnation procedures. I think it is our duty to try and clear it up.

271 SENATOR KITZHABER: I would be happy to put this into a seperate bill, I think it will jeopardize the bill and I think if we lose the whole bill we do just as much damage to small power producers as we do by leaving the statutes on the books. I cannot support bringing it into this bill.

283 SENATOR STARKOVICH: I can support the language but not in this bill. I would ask that the Committee Administrator come back tous on Wednesday with a bill relating to energy that we can tuck this into and have an up or down vote on that issue.

295 SENATOR COHEN: I support the amendments but I don't want to deal with it in this way. We should go out with the straight bill.
I am prepared to vote it out today in a bill that can go on its own. I'd vote for it on the Senate Floor.

344 SENATOR KITZHABER: The clerk will call the roll.

SEN DAY		AYE
SEN COHEN		NO
SEN HAMBY	MOTION FAILS	AYE
SEN HEARD		AYE
SEN MONROE		ABSENT
SEN STARKOVICH		NO
SEN KITZHABER		NO

353 SEN DAY: I am going to serve notice of a Minority Report on this bill.
If we vote it out there will be a minority report on the floor.
The minority report will include the -8 amendments.
It should include Senators Heard, Hamby and Day.

405 SENATOR KITZHABER: Now to HB 2295. We have miscellaneous amendments, Economic Development portions, some work to clear up on Standing and and Post-Acknowledgement. We will start with "Other" amendments (See EXHIBIT "G")

480 MARY ANN HUTTON, AOI: The amendment adds provision to assure that a state agency action would not be invalidated by a court for failure to comply with the goals if it complied with statutes addressing same subject. Addresses the question of what state agency actions are subject to the goals.

TAPE 188-A

120 SENATOR DAY: The AOI amendments only supplement by amendments. TheDay amendments require that after state agency rules and programs are approved by LCDC, the agency shall carry out duties and take actions affecting land use in a manner consistent with approved rules and programs of agency.

206 ELDON HOUT, LCDC: I feel I am the wrong person to speak to these amendments
It is a problem of the Governor's Office and his people are not here to speak.

229 BOB STACEY, 1,000 FRIENDS OF OREGON: Governor's Office submitted an amendment to the House committee relating to ADC cordination. They were concerned that state agencies be able to continue the current practice of maintaining the balance between local administration of goals and state agency administration of their programs. The practice that has evolved is to provide that state agencies can relay on the determination of goal compliance that has been determined by a local government. The amendments propsoed by the Governor to the House resolved that problem. Today's amendments proposed today may well upset that balance resulting in agency authority supplanting that of local government and would result in the existing responsibility of LCDC to enforce certain provisions of certain goals being superceded by certain statutory state agency programs. I want to make sure that the effect is clear.

The Committee members, Bob Stacey, Eldon Hout, continue to discuss the effect of the proposed amendments. See tape for specific comment.

TAPE 189 A

The principle members and participants of the process agree to meet to work on language of compromise that would best serve the interest of the process.

006 CHAIRMAN KITZHABER, opened the meeting at 1:15 P.M.

HB 2320, relating to energy

030 DICK BROWN, Pacific Power & Light, spoke with regard to the proposed amendments (EXHIBIT A). They agreed in principle with the public power agencies on the amendments. He proposed on line 9, of Exhibit A, after "upon payment of" insert "just compensation, including". Delete on lines 9-11 "the fair value ... 543.010 (2), plus". Also on line 15 & 16 delete "The net investment shall...of ORS 543.010 to 543.620."

094 DICK IMAN, People's Emerald Utility District, were satisfied with the bill without compromise.

130 JAMES FINN, Attorney, Schwabe, Williamson, Wyatt, Moore & Roberts, read prepared testimony into the record (EXHIBIT B) on behalf of the People's Emerald Utility District rejecting the proposed amendment.

168 SEN. COHEN, would it be unconstitutional if applyed to projects already in place after the enactment of this act.

189 MR. FINN, no, the question would not be raised in that case.

207 MR. FINN, with the insertion of "just compensation" into the statutes it would make certain that this committee would not be endorsing any one method of valuation. This amendment would be assuring that Pacific Power & Light would not be obtaining a windfall price for the property in excess of what they would be entitled to under the Oregon Federal Constitution. The amendment also leaves in the reference to severence damages in the statutes by substituting the word "including" for the word "plus". A just compensation includes severence damages.

292 MICHAEL JACOBS, Utility Districts, if you are going to move off the net investment standard "just compensation" appears to be a fair standard to move to.

308 SEN. KITZHABER, if the amendment would be adopted does the interest decline. MR. BROWN, yes, it would decline.

330 MOTION: SEN. KITZHABER moved to adopt the amendments to HB 2320 (Exhibit A).

333 VOTE: With no objection the motion passed.

335 MOTION: SEN. DAY moved to send HB 2320 with amendments with a Do-Pass recommendation to the Senate floor.

336 VOTE: In a roll call vote the motion passed with Senators Day, Cohen, Starkovich and Kitzhaber voting AYE; Senators Hamby, Heard and Monroe excused.

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PRESIDENT
TELEX NO 360-522 (HHBPROJMT)

EXHIBIT: "A"
Sen. Com Energy & Environ.
Date: 6-15-83
Witness: H. H. Burkitt
Bill Number: H/Bill 2320
No. of Pages: 8 pages

STATEMENT BEFORE THE OREGON SENATE
ENERGY AND ENVIRONMENT COMMITTEE

HB 2320

Since the legislature is again considering the promulgation of a bill to encourage the production of electrical power by cogenerators and small power producers, identified as Qualifying Facilities (QF's), it is important that all aspects of this complex, and often misunderstood, business of electrical power generation, transmission, consumption and pricing be properly addressed so that the passage of any legislation will clearly meet the intended objectives and goals.

The Oregon Department of Energy (ODOE) was created a number of years ago to assure that Oregon would always have a sufficient supply of all energy forms. One of the most widely used and easily transmitted forms of energy is electric power. This electric energy can be generated by electric utilities, including the Bonneville Power Administration (BPA), in large coal or nuclear central station operations, or by large hydroelectric installations. As you are keenly aware, the Northwest presently has a large surplus of electrical energy due, primarily to good water years for hydroelectric power generation. However, this condition will not exist forever. Oregon needs to make plans <u>now</u> for its energy survival in the years to come. Since its creation, the ODOE has made valiant attempts to bring stability to our future electric power needs, but, to the best of my knowledge, has only had limited success in the promotion of cogeneration and small power production facilities. What has been needed is a method that would allow developers access to rates that would encourage development of these types of energy resources. Oregon industry can, and will, provide a viable alternative to large, questionable and costly projects, such as the giant Washington Public Power Supply System (WPPSS) fiasco if given the chance. Many of our industries have the ability, need and resources to develop cogeneration or small power production facilities as a part of their manufacturing operations.

Over the past few months a sub-committee of the Oregon House of Representatives' Energy and Environment Committee, chaired by Representative Bradbury, has worked diligently with concerned representatives of industry, public and private utilities, state government, and citizens to develop the bill now before you that, hopefully, will encourage the development of cogeneration and small power production facilities in Oregon. This effort has not been easy. The subject of electric power generation, its transmission, consumption and costs, as previously stated, is very complex. Incentives leading to development of cogeneration and small power production projects are usually economic. Working in this industry, one realizes that there are really very few opportunities to develop an economically viable project. Developers of cogeneration or small power production facilities review each opportunity in great detail, since the risks are high and profit potentials are low. Developers must be assured that the project will result in the greatest return for each dollar invested. Otherwise, the developer might as well put his funds in certificates of deposit where risks are minimal and the return is practically guaranteed. Industry finds that it must evaluate each project on its own merit and that the dollars that might be dedicated to electrical power generation projects must compete with all other projects.

Representative Bradbury's subcommittee, with the assistance of the Legislative Council's Office, has prepared this draft of HB 2320. While it does not address any economic incentives outright, it does provide an avenue to greater economic returns for QF's. In Section 5, it requires connected electric utilities to "make a good faith effort to comply with a request from a qualifying facility to transmit energy, or energy and capacity, produced by the qualifying facility to another electric utility or the Bonneville Power Administration," or, if it does not transmit (wheel) the power, "the electric utility shall purchase the qualifying facility's energy, or energy and capacity, at a price which is the higher of: (a) the electric utility's avoided cost, or (b) the index rate." Index rate is defined as "the lowest avoided cost approved by the Commissioner for a generating utility for the purchase of energy, or energy and capacity, of similar characteristics, including on-line date, duration of obligation, and quality and degree of reliability." "A good faith effort to transmit energy, or energy and capacity, under this section shall be demonstrated by publication of a generally applicable reasonable policy allowing the electric utility's transmission facilities to be used by the qualifying facilities on a cost-related basis."

The utilities with low avoided costs will, in almost all cases, be Public (Peoples) Utility Districts (PUD's) or municipalities, since they now purchase, and will, in all probably continue to purchase all of their firm energy requirements from the BPA supply system. Private, investor owned utilities (IOU's), who, over the years, have developed a "mix" of resources, and who must plan to meet their own future firm energy needs, will have considerably higher avoided costs, particularly when forecasting the need for a generating resource 20, 25, 30 and 35 years into the future. It is these costs that may be avoided by the development of a cogeneration or small power production facility. Because the developer is willing to make an investment in generating and displacing these kilowatts in the utility's planning for future generating resources, he should be entitled to the utility's full avoidable costs for that next generating plant.

The Supreme Court of the United States rendered a decision on May 16, 1983, with Justice J. Marshall writing the opinion, in the suit brought by the American Paper Institute, Inc. against the American Electric Power Service Corporation affirming that the Federal Energy Regulatory Commission (FERC) shall prescribe rules requiring connected utilities to pay their highest avoided cost to qualifying cogenerators and small power producers under the provisions of the Public Utility Regulatory Act (PURPA), section 210. The decision further states "that rates set by FERC shall be just and reasonable to the electric consumers of the electric utility and in the public interest, shall not discriminate against qualified cogeneration and small power facilities, and shall not exceed the incremental cost to the electric utility of alternative electric energy."

As I have stated many times in prior testimony before Representative Bradbury's sub-committee, the Northwest Power Planning Council and the BPA, cogeneration and small power production facilities will provide a significant degree of conservation. First, because Oregon is a timber producing state, most cogeneration and small power production projects will utilize wastes from manufacturing and harvesting operations, often referred to as "renewable resources". Secondly, these projects have the ability to eliminate the tremendous line loss inefficiencies that are inherent in the giant BPA transmission system, since the electrical energy will be consumed within the local area, in most cases by the QF itself, rather than be "wheeled" outside the region. This will free these transmission lines to carry large blocks of electrical power from major hydro and central station facilities to consumers within, as well as outside, the region at lower costs to ratepayers. It is our responsibility to insure that electrical energy will always be available in Oregon, wherever it is needed, at a reasonable cost, not necessarily the lowest cost.

I have also attached copies of other previously given testimony regarding my concerns for the shortcomings in our planning efforts to encourage the development of cogeneration and small power production facilities. Should you have any further questions, I will be happy to answer them at this time.

HHB

P.O. BOX 8549
PORTLAND, OR. 97207

H. H. Burkitt Project Management

LINCOLN TOWER, SUITE 1005
2211 SW FIRST AVENUE
PORTLAND, OR 97201
(503) 227-0336
TELEX NO. 360-522 (HHBPROJMT)

H. H. BURKITT
PRESIDENT

COMMENTS REGARDING HB 2320

Since the legislature is again considering a bill to encourage the production of electrical power by cogenerators and small power producers, identified as Qualified Facilities (QF's), it is important that several areas be addressed so that the meaning is clear and that the objectives of the legislature are met. Industry does not need any more meaningless legislation.

To meet these objectives, the following issues must be clarified so that the QF will always know what the conditions are, and how they are to be met. These issues must be reviewed in their proper prospective so that the intent of the legislature and the concerns of industry are met. Keep in mind that it is Oregon industry that has both the resource and the ability to cogenerate steam and electrical power as a part of its normal business activity.

1. Avoided Cost: The proposed House Bill 2320 defines "Avoided Cost" as "the incremental cost to a public utility" (previously defined as an electric utility regulated by the Public Utility Commissioner under ORS, Chapter 757, or any other utility that provides electrical energy to consumers within the State of Oregon) "of electric energy or capacity, or both, that would be generated but for the purchase from a cogeneration facility or small power production facility." Previously, Senate Bill 255 defined "Avoided Cost" as "the incremental cost to a public utility of electric energy or capacity, or both, which the public utility would generate itself or purchase from another source but for the purchase from a cogeneration facility or a small power production facility." The difference between these two definitions is "or purchase from another source". Should the generating utility decide that it must purchase electrical energy to meet its needs at a higher cost than that for its own generating capacity due to oversights in its planning, then the QF should be entitled to that rate as the "Avoided Cost". If the legislature truly intends to encourage the production of electrical energy from QF's, then this definition must be expanded so that the QF will know how to plot its own destiny and to plan for its financing requirements. The area of greatest impact regarding "Avoided Cost" is the term, or length, of the contract for the purchase of the QF's electrical energy output by the utility. If the contract is of such duration as to allow the utility to avoid, displace, or defer the cost of construction of a like amount of kilowatt hours (kWh) of generating capacity, then the QF should be entitled to that cost in mills/kWh from the utility. Conversely, should the contract be of such short duration, or for the sale of surplus electrical energy, then the QF should only be reimbursed for the fuel and labor displaced in the generation of that like amount of kWh's. The Oregon Public Utility Commissioner has issued his final order, No. 81-219, for the implimentation of the provisions of PURPA-210, requiring each of the private, investor owned utilities to file with the PUC, on an annual basis, a table of avoided costs (OAR 860-29-080). This allows industry to continually evaluate its position regarding the production of electrical energy and whether or not it can recover its capital costs with a reasonable return on investment (ROI). It does not, however, provide an analysis of the PUD's "avoided cost".

2. Treatment of Public Utility Districts (PUD's): It is our understanding that the small Public Utility Districts (PUD's) are concerned over what constitutes "Avoided Cost". Most PUD's do not generate any electrical energy, nor do they have vested interests in generation facilities, except the Eugene Water and Electric Board (EWEB). Under this proposed legislation the PUD's may be required to accept the output from a QF within their service territory at an undefined "Avoided Cost". This objection could be overcome if the "Avoided Cost" definition encouraged the QF and the PUD to work in concert to develop power sales contracts with public utilities that have generating facilities. Under the terms of these power sales contracts, the QF and PUD would sell the output of the QF's generating capacity to the generating utility at its "Avoided Cost". This would relieve the PUD of paying a price higher than its "Avoided Cost", which in most instances is the purchase of hydroelectric power from the Bonneville Power Administration (BPA). Under this scenario, electrical power would be generated by the QF at a location where it is needed, thereby conserving the line losses that would otherwise be incurred in the transmission of that power, and would make power available to the public in the QF's and PUD's service area during periods of unexpected catastrophe, such as the Columbus Day wind storm. This type of effort would also free up transmission capacity since that like amount of power would not have to be wheeled over the line to the PUD. In effect, the power sales contract will result in a paper transaction because the kWh's generated by the QF will be consumed in that service area. It will also result in the lowest cost for assured firm power to the ratepayer. The implementation of this type of program will encourage those industries that have the assured renewable resources to develop cogeneration and small power generation projects since they will be able to demonstrate satisfactory rates of return (ROI) through the generating utility's long term "Avoided Cost" rate schedule. However, should it be determined that a PUD does, in fact, have a vested interest in a generation facility, then that interest represents the "Avoided Cost" of that PUD, and should allow the QF, should he elect, to that rate for the cogenerated electrical energy.

HBURKITT PROJECT MANAGEMENT

P.O. Box 8549
Portland, Oregon 97207

March 18, 1983

Mr. Roy Hemmingway
Oregon Representative
Northwest Power Planning Council
700 S.W. Taylor Street, Suite 200
Portland, Oregon 97205

Subject: Comments Regarding the Northwest Regional Planning Council Draft Regional Conservation and Electric Power Plan - 1983

Dear Mr. Hemmingway:

I was pleased to have the opportunity to hear your comments regarding the Draft Regional Conservation and Electric Power Plan at the Wood Energy Coordinating Group meeting last Tuesday at the new Portland Building. My company furnishes consulting engineering services to the fiber processing industries. Such engineering services include the development of steam and electrical power generation projects to meet industry's production requirements.

At your request, I am providing the following comments regarding what I see as a failure of the draft plan to adequately address the importance of acquiring electrical power from potential cogenerators and small power producers, referred to as Qualifying Facilities (QF's), at the time their projects are developing, even under surplus electrical power conditions, and at a cost that will provide a reasonable rate-of-return on their investment. As you know, when industry has an interest in the development of a project to meet their production requirements, that is when we must take advantage of the opportunity to acquire whatever electrical energy is made available, otherwise it will be lost forever. It is not a simple matter to go back at a later date to upgrade boilers to supply superheated steam to turbine-generators. Likewise, it is not possible to operate high pressure design boilers at low pressures until the need for power is demonstrated due to the fluid circulation within the boiler. In other words, when a boiler design is fixed to meet local steam processing pressure and temperature needs, it cannot be upgraded at a later date to fit turbine-generator inlet conditions. It will not be practical to front end the project feasibility, engineering design and site permitting, and then defer the project until the need for power is demonstrated. Industry's needs will never coincide with the development of the regional electrical power plan. "Site Banking" of electrical generation projects offered by QF's just simply will not work. I believe that the Regional Conservation and Electrical Power Plan must include a positive, definitive plan for the acquisition of electrical energy from QF's when it is available and at a price that will continue throughout the next twenty (20) years to encourage our local industries to develop energy production projects.

The draft plan also directs that resources be acquired, lowest cost first, in accordance with the following priorities: first, conservation; second, renewable resources; third, waste heat and high fuel efficiency resources; and finally, fourth, all other resources, including conventional thermal central station facilities. I wish to point out that the type of power generation projects that would be developed by the fiber processing industries do provide a significant degree of conservation. These projects have the ability to eliminate the tremendous line loss inefficiencies that are inherent in the giant BPA transmission system, since the electrical energy will be consumed within the local area, in most cases by the QF itself, rather than be "wheeled" outside the region. This will free these transmission lines to carry large blocks of electrical power from major hydro and central station facilities to consumers within, as well as outside, the region at lower costs to ratepayers. The policy of always purchasing conservation and/or the lowest cost resource first may not be in the best interest of the region or ratepayer, and may not in the final analysis be the lowest cost resource when all other factors are taken into account, such as power outages, transmission losses and inadequate power supplies at the time industry has a desire to make a significant contribution to a local economy. It is the responsibility of the Northwest Power Planning Council to ensure in the Regional Conservation and Electrical Power Plan that electrical energy will always be available wherever it is needed at a reasonable cost, not necessarily the lowest cost. Should the "lowest cost" concept always prevail, the region could suffer because a QF was unable to develop a perfectly viable resource that would benefit the region in future years.

It is suggested that the plan ensure that local utilities and BPA develop all markets for electrical power to the fullest extent possible, including the ability to wheel this electrical power to other regions of the country, that will encourage industry to develop cogeneration and small electrical power generation projects as a part of their investment programs.

Very truly yours,

H. H. Burkitt
President

HHB/bj
cc: Daniel J. Evans, Washington, Chairman
Robert Saxvik, Idaho, Vice-Chairman
Alfred A. Hampson, Oregon
Charles T. Collins, Washington
W. Larry Mills, Idaho
Keith L. Colbo, Montana
Gerald Mueller, Montana
Jim Litchfield, Technical Director, Central Staff
Richard L. Durham, Oregon Department of Energy

EXHIBIT: "B"
Sen. Com Energy & Environ.
Date: June 15, 1983
Witness: David Philbrick
Bill Number: HB 2320
No. of Pages: 5 pgs

OREGON DEPARTMENT OF ENERGY
TESTIMONY

Before the
Senate Energy and Environment Committee
on
HB 2320, A-Engrossed

Sale of Electricity from Private Power Producers

The purpose of this Bill is to maintain an equitable climate in Oregon for the development of power production facilities by non-utilities. Such facilities sell their output to utilities and typically have been fueled by solar, wind, geothermal, hydro, or biomass energy resources. If Oregon is seriously interested in the development of these resources, private sponsorship is of major importance. This Bill will help provide the opportunity for private sponsorship without burdening the ratepayer or motivating unneeded development. We strongly encourage you to support this legislation.

Importance

Private power producers are important to the near term development of non-traditional power sources. For example, in California 217 megawatts of wind power is expected to be on-line by the end of 1983. This capacity consists of 35 projects using small to medium size turbines in clusters and are sponsored by private power producers. Similarly, most of the geothermal energy developed in California is produced by resource companies, not utilities. The first geothermal generation on-line in Oregon has been sponsored by a private power producer. A well-defined and understood climate for the sale of privately-produced power is important if these resource developers are to accept the risks of project development in Oregon.

History

In considering SB 255, the 1981 Legislature recognized the discrepancy between prices being offered for purchase of power by public and private utilities and the need to encourage private power producers. SB 255 addressed the price discrepancy issue by establishing a minimum base rate that all utilities must pay for power purchased from small producers. SB 255 left open the opportunity for public utilities to avoid paying the base rate by transmitting (wheeling) the power to that of a neighboring utility. Because of the time pressures under which the legislation was developed, a sunset date of July 1, 1983, was incorporated into the 1981 measure. The concept before you, HB 2320, A-engrossed, recognizes both

Oregon's experience in implementing SB 255 and considerable review by the House Environment and Energy Committee. In forwarding HB 2320 to the Senate, the House Environment and Energy Committee received significant input from industry, state agencies, and public and private utilities.

Summary of the major points in the proposed Legislation

Legislative Policy - HB 2320 establishes as a state goal efforts to increase the marketability of electric power produced by non-utility power generators while protecting both utility ratepayers and the private facility operator over the life of any power sales contract.

Purchase price - HB 2320 proposes a purchase rate for power that is as favorable to new power generation as possible without obligating ratepayers to pay more for their power than they otherwise would. A utility, under the provisions of the Bill, must purchase power from a non-utility power generator at a rate that is equivalent to at least the utility's avoided cost. Avoided cost is defined as the incremental cost to the purchasing utility of electricity that would otherwise have been purchased or generated by that utility. Non-utility generators are given an option of either selling their power for the avoided cost calculated at the time the power is delivered or the avoided cost forecasted for the time of delivery calculated when the contract is signed. This later provision is important for giving a developer the ability to anticipate whether or not they will have sufficient revenues to repay a loan.

Transmission obligation - HB 2320 encourages utilities to transmit power from small power generators when it is desired. Under the bill, a utility that fails to make a good faith effort to satisfy a request from a power generator to transmit power must pay the higher of the lowest avoided cost of an investor-owned utility or their own avoided cost. "Good faith effort" is defined as the development of reasonable policies to allow use of the utilities transmission facilities on a cost-related basis.

Regulation/reporting requirements - HB 2320 requires all utilities, consistent with their existing administrative processes, to adopt rate schedules and policies associated with the purchase of power. It requires utilities to forecast and publish their incremental power cost for at least twenty years into the future. All utilities are required to send copies of their rate schedules to the Public Utility Commissioner. The Public Utility Commissioner has review/approval authority over the filings of the investor-owned utilities. The Bill continues existing statutory exemptions of non-utility generators from regulation as a utility.

Conclusion

The provisions in the Bill are generally consistent with federal law. In two areas, HB 2320 goes beyond federal law: it requires avoided costs to be forecasted and, if desired by the facility owner, obligated under contract for at least the next twenty years, and it encourages reasonable wheeling policies. HB 2320 falls short of the incentive that many resource sponsors want and believe would encourage development of new resource projects in the state. It does, however, create an environment which is as conducive to development by private generators as by utilities. The bill provides a clear, defined legal framework within which a private power producer can consider project development. We strongly encourage your support of this Bill.

Attached to our testimony is a Section by Section summary of HB 2320, A-Engrossed.

DP:zs
0458J(D1-F3)
6/7/83

Attachment

SECTION BY SECTION SUMMARY

Section 1 provides definitions. Important definitions include the following: "avoided cost" is defined as the incremental cost to the purchasing utility of electricity that would otherwise have been purchased or generated. "Index rate" is defined as the lowest avoided cost for investor-owned utilities. Definitions are included which make a distinction between investor-owned and publicly-owned utilities. These are important given distinctions in the Bill regarding regulation by the PUC.

Section 2 establishes legislative intent as promoting the development of permanently sustainable energy resources and protecting both the utility ratepayer and the private generator over the life of a power sales contract.

Section 3 deals with the rates utilities must pay in purchasing power from private generators. It requires utilities to project their avoided costs for a period of not less than the next 20 years. A utility is obligated to offer a nonutility power generator it's avoided cost calculated when the power is delivered, or it's avoided cost forecasted for the time of delivery when the contract is signed. For facilities installed before November 8, 1978, utilities are not required to negotiate contract renewals at avoided cost prices unless such prices are necessary to encourage continued use of the facility. Rates for sale of power to small nonutility generators can not discriminate against such facilities.

Section 4 addresses the responsibilities of the Public Utility Commissioner and governing bodies of publicly-owned utilities. The Commissioner is responsible for establishing general criteria to define the characteristics of nonutility power generators that qualify for the benefits of this Act. The Bill requires the Public Utility Commissioner to establish rate schedules and policies implementing the provisions of the Bill for investor-owned utilities. Similar requirements are placed on the governing bodies of publicly-owned utilities for their utilities. The Act requires all utilities to have their rate schedules and policies available at the Public Utility Commissioner's office.

Section 5 a utility that fails to make a "good faith effort" to transmit electricity at the request from a qualifying facility, to another utility, must pay the higher of the electric utility's avoided cost or the index rate. "Good faith effort" is defined as the availability of a generally-applicable, reasonable policy of the utility, allowing a private power producer to use the utility's transmission facilities on a cost-related basis.

Section 6 provides an exemption for non-utility generators from regulation as a utility, and places this exemption in the statutes pertaining to nonutility generating projects.

Section 7 places the exemption from regulation as a utility for nonutility generating projects in the statutes dealing with utility regulation.

Section 8 is a repealer of the statutory provisions amended by this Act.

Section 9. An emergency clause necessitated by the sunset of existing statutes on July 1, 1983.

DP:zs
0416J (D2,F3)

EXHIBIT: "C"
Sen. Com Energy & Environ.
Date: 6-15-83
Witness: Judith Miller
Bill Number: HB 2320
No. of Pages: 1pg.

June 15, 1983

Senator John Kitzhaber, Chairman
Senate Energy & Environment Committee
S306 State Capitol
Salem OR 97310

RE: HB 2320

Dear Senator Kitzhaber:

As it sits before you, HB 2320 is a carefully crafted and negotiated bill. In the House Environment & Energy Committee it was the product of 5 hearings and 6 work sessions. Although we have continuing concerns regarding HB 2320, we feel that the best possible bill is now before you. As a subcommittee, Representatives Bradbury and Van Leeuwen worked very hard with a large number of participants -- public and private utilities, the Oregon Department of Energy, and a number of hydropower and cogeneration developers -- to develop a bill that would be acceptable to all concerned. Through our participation, we have agreed not to oppose or amend this bill while it continues through the Senate process. This agreement is contingent on the assumption that the bill's provisions not be altered in any way.

As written, this bill requires utilities to publish a schedule of avoided costs, the future prices we expect to pay for independently produced electricity, and send them to the Oregon Public Utility Commissioner. Further, we will be expected to publish a policy allowing access to our transmission facilities on a cost-related basis, if the producer so requests, and wheel power to the Bonneville Power Administration or another utility.

As you know, good faith is the centerpiece of HB 2320. Oregon's publicly owned utilities urge you in good faith to pass HB 2320 to the Senate floor as it sits before you.

Sincerely,

Larry Schwartz

Larry Schwartz, Director,
League of Publicly Owned
Electric Utilities

Libby Henry

Libby Henry
Eugene Water & Electric Board

Michael Jacobs

Michael Jacobs, Clatskanie,
Northern Wasco County, and
Tillamook PUDs

Judith Miller

Judith Miller
Central Lincoln PUD

EXHIBIT:	"D"
Sen. Com Energy & Environ.	
Date:	6-15-83
Witness:	Teace Adams
Bill Number:	HB 2320
No. of Pages:	2pgs

ENERGY
CONTROL
SYSTEMS
OF LAKE OSWEGO
16841 SW Cortez Ct.
Lake Oswego, OR 97034
(503) 636-8745

HB 2320

JUNE 15, 1983

TESTIMONY PRESENTED TO THE OREGON SENATE COMMITTEE ON ENERGY & ENVIRONMENT
BY TEACE ADAMS
4550 SW CARMAN DR.
LAKE OSWEGO, OR 97034

on Behalf of

ENERGY CONTROL SYSTEMS OF LAKE OSWEGO

WE RECOMMEND PASSAGE OF HB 2320

First, I participated in the long and arduous endeavors of the House subcommittee on this bill. While we would have preferred stronger legislation encouraging the development of alternate, renewable energy resources in Oregon, we would recommend acceptance of the present language.

This bill replaces SB255 which sunsets this year. We believe that it is imperative that these concepts continue to be addressed in Oregon law.

Energy Control Systems is a small, Oregon based company. Fortunately, our business is not limited to Oregon or to the Pacific Northwest. We provide equipment, design, and advise on the conservation and/or production. Our contacts in other areas of the country and abroad indicate that the Pacific Northwest and teh State of Oregon are hardly ideal locations for our type of business.

Nevertheless, Oregon and the Pacific Northwest is where the tecnology exists. Demands for energy in isolated areas provided the impetus of the development of that technology. PURPA added new dimentions and encouraged the development of techniques to interface with power grids.

Unfortunately in this legislative session, legislators have viewed the present energy surplus in a short-sighted manner. Failure to encourage the development of techniques to utilize renewable energy sources NOW can mean higher costs for our future energy needs.. and possible dependence on non-renewable resources which pollute our environment.

more....

We are heavily invalved in small hydroelectric projects. As such production is often thought of ir in terms of structures similar to the Bonneville Dam, I would like to discribe a couple of recent projects we have been involved in. The first project is in Seard, Alaska. It illustrates a typical "run of the river" hydro installation. In such applications water may be diverted or damed briefly. Flow of the water is not impeded. Generally speaking the impact on the environment is negligble or even positive, wince such projects can be combined with flood control measures.

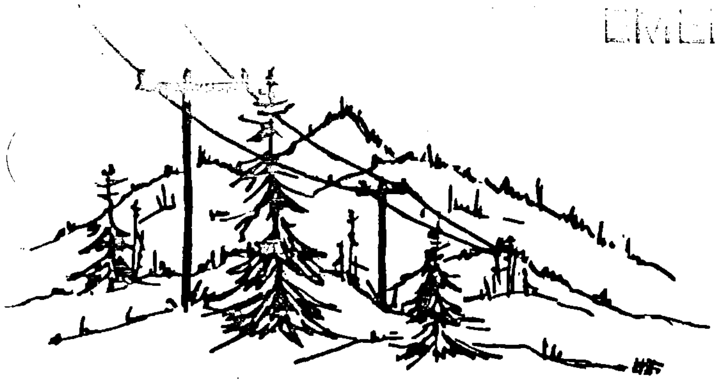
I ha e provided an illistrative notebook for the committee to share. I am sorry that I could not supply one for each of you. This collection of photos shows the use of water from a mountain source. The water is also the water supply for the city of Sewart. The project was sponsored by the Seward Hospital and funded by the Alaska Dept. of Energy. The electricity produced is used by rhw hospital and also furnishes a portion of the elctrical needs of the City..

The second project utilizes already existant water pressure in a water district's system. Water arriving into the system at a PSI of approximately 125 must be reduced to a pressure of 72 PSI. By placing a generator and turbine on he system before the pressure reducer, such power is being being converted to electric energy and fed into the power lines of the electrical utility. Sorry, I don't have pictures of the site, but just mentally picture any manhole you can remember!

You will note the name "Hydro-Watt in the photos of the Seward project.Hydro-Watt is another Oregon based company involved in hydro power. We have worked together on may projects with Mert Hunking of Hydro-Watts.

We are aware of many who have ventured in similar enterprises who have been less successful than our two companies. We sincerely hope that Oregon lawmakers will realize the importance of developing our renewable resources while we have the expertise and time to do so. Energy shortages are real. Escalation of energy costs are certain. We must act now to insure energy needs for the future.

Icace adams



EMERAL[illegible] DISTRICT
PLEASANT HILL PLAZA
84899 TILLICUM AVENUE, SUITE 9
PLEASANT HILL, OREGON 97401
PHONES: 746-1583
746-5774

EXHIBIT: "E"
Sen. Com Energy & Environ.
Date: ~~August 7, 1981~~ JUNE 15-83
Witness: Thomas Nelson
Bill Number: HB 2320
No. of Pages: 1 pg

Mr. Don Frisbee
Pacific Power & Light
920 S.W. 6th Avenue
Portland, Oregon 97204

Dear Mr. Frisbee:

This letter serves as the notice required by ORS 543.610 that the Emerald Peoples Utility District will take over and thereafter maintain and operate a portion of the hydro-electric project operated by Pacific Power & Light on the North Umpqua River in Douglas County, Oregon on or after August 7, 1983 upon payment of the fair value of the project as defined in ORS 543.610 (1) and ORS. 543.010 (2).

Sincerely Yours,

Richard O. Eymann

Richard O. Eymann
Chairman, Emerald PUD

ROE/es
cc: Federal Energy Regulatory Commission
Oregon Public Utilities Commission
Oregon Water Policy Review Board
Oregon Department of Energy
Oregon Department of Water Resources

RECEIVED
AUG 10 1981
DON C. FRISBEE

SUBMITTED BY L.B. DAY

Exhibit "E"
Senate Energy & Environ.

Legislative Counsel
HB 2320A-8) 6-27-83
6/24/83 (c2) 1 page

PROPOSED AMENDMENTS TO A-ENGROSSED HOUSE BILL 2320 1 P8

On page 1 of the printed A-engrossed bill, line 2, after the first "ORS" insert "543.610 and".

On page 3, after line 24, insert:

"SECTION 7. ORS 543.610 is amended to read:

"543.610. (1) Upon not less than two years' notice in writing the state, or any municipality thereof, shall have the right at any time to take over and thereafter to maintain and operate any project constructed under a license pursuant to ORS 543.010 to 543.620, upon payment of the fair value of the property taken over, [not exceeding the net investment as defined in ORS 543.010 (2),] plus such reasonable damages, if any, to valuable, serviceable and dependent property of the holder of the license, not taken over, as may be caused by the severance therefrom of the property taken, and shall assume all contracts entered into by the licensee which are required to have and do have the express approval of the commission. [The net investment shall be determined in accordance with the provisions of ORS 543.010 to 543.620.] If the sum to be paid cannot be agreed upon by the holder of the license and the municipality or the state, as the case may be, it shall be determined in a proceeding in equity instituted by the state or municipality, as the case may be, in the circuit court of the county in which the major part of the project is located.

"(2) There is also expressly reserved to the state, and any municipality thereof, the right to take over all or any part of any project by condemnation proceedings as may be provided by the laws of Oregon or the charter of any such municipality.".

In line 25, delete "7" and insert "8".

On page 4, line 11, delete "8" and insert "9".

In line 13, delete "9" and insert "10".

EXHBIT "F"
HB 2320
1 page
6-27-83

Northwest Small Hydroelectric Association

P.O. Box 25549 • Portland, OR 97225
(503) 649-2641

Neil Macdonald - President
Michael Hefner - Exec. V.P.
Jan Boettcher - Secretary
Robert H. Campbell - Gen. Counsel
Claude T. Olson - Treasurer

TESTIMONY BEFORE THE SENATE ENERGY AND ENVIRONMENT COMMITTEE June 27, 1983

RE: HB 2320
HB 2406

Mr. Chairperson and Committee Members:

The NORTHWEST SMALL HYDRO ASSOCIATION represents several hundred industry members in the Northwest. Oregon membership is a significant portion of the Association. As Director of the Association, I would like to bring to your attention this afternoon an issue that will significantly impact hydropower development in Oregon.

Your confirmation of HB 2320 will retain an avoided cost purchase base which will provide a marketplace for generation from small power production facilities. We in the industry appreciate Oregon's continuing support to establish a climate in which we can successfully sell power to provide a long-term, low-cost renewable resource which will ultimately benefit the ratepayers in Oregon.

HB 2320 affirms the Legislature's goal to promote the development of these resources and states Oregon's policy--Section 2, item (3)--to:

a) increase the marketability of electric energy producedby qualifying facilities located throughout the state for the benefit of Oregon's citizens; and

b) create a settled and uniform institutional climate for the qualifying facilities in Oregon.

However, an extremely significant problem remains which could negate both the state and federal legislation which has been enacted to promote the development of hydropower. Statutes remain within the law (ORS 543.150, 543.610 and 543.620) which would allow a municipal corporation to take over any hydroelectric project once it has been developed by paying only cost less depreciation for its assumption. Proposed HB 2406 would have rectified this threat by removing the statutes from existing law.

Without the removal of those statutes, financing of hydroelectric development by qualifying facilities will be severly jeopardized. This includes not only the ability to obtain private financing from lenders but the ability to obtain bond counsel approval for revenue bonds. The State's own renewable resource loan program could be jeopardized by these statutes remaining a part of Oregon law. Because there appears to be a pecking order of municipalities, certain municipal projects as well as privately developed projects could be subject to this threat.

Consistent Oregon policies created by the Legislature in the funding of the renewable resource loan program (SELP); the staffing of the Oregon Department of Energy and the Water Resources Department to assist in hydro development; and the 1981 and 1983 legislation creating an environment for small hydro development, has encouraged site owners to commit considerable investments toward the development of specific sites in Oregon. If protection of these foregone costs cannt be assured through the passage of a measure similar to HB 2406, Oregon site owners will suffer the loss of investments to date as well as lose the ability to acquire the additional funding necessary to complete construction. The jeopardy created by the failure to remove those old, yet unused statutes from Oregon's law, is not consistent with all of Oregon's policies to promote the development of small qualifying power production facilities and does not maintain the good faith atmosphere which prompted site owners and developers to invest in these projects over the last three years.

Oregon has the reputation in the Northwest of being a leader and has approached the power marketing support for renewable resources in that same manner. Other states have reviewed your work in 1981 as a foundation for development of policy. In the development of your policy you have also protected the rights of the public in maintaining Oregon's environment. The Association supports the development of hydro facilities which have been cooperatively planned to protect the environment while meeting the state's resource goals.

Association membership includes not only developers and site owners but consultants in engineering, environmental science, and financing; it includes equipment manufacturers, suppliers and contractors. The opportunity for employment in Oregon by these members is directly influenced by legislation that contradicts the goals established in 1981 and 1983.

We request that if HB 2406 is to be tabled, that the body of HB 2406 become an amendment to HB 2320 in order to maintain the state's intent of planned development of its renewable resources. As testimonial records will indicate, there was substantial input in support of HB 2406 when it appeared before the House Energy and Environment Committee in April.

Thank you for your consideration in approving this necessary change to make SB 2320 a truly effective Legislative effort.

NORTHWEST SMALL HYDRO ASSOCIATION

Jan Boettcher

Jan Boettcher
Executive Director

EXHIBIT A
ENERGY & ENVIRONMENT
DICK BROWN
6-30-83
HB 2320 1 pg. exh.

PROPOSED AMENDMENTS TO A-ENGROSSED HOUSE BILL 2320

On page 1 of the printed A-engrossed bill, line 2, after the first "ORS" insert "543.610 and".

On page 4, after line 10, insert:

"<u>SECTION 8.</u> ORS 543.610 is amended to read:

"543.610. (1) Upon not less than two years' notice in writing the state, or any municipality thereof, shall have the right at any time to take over and thereafter to maintain and operate any project constructed under a license pursuant to ORS 543.010 to 543.620, upon payment of just compensation, [the fair value of the property taken over, not exceeding the net investment as defined in ORS 543.010 (2), plus] including [such reasonable damages, if any, to valuable, serviceable and dependent property of the holder of the license, not taken over, as may be caused by the severance therefrom of the property taken] and shall assume all contracts entered into by the licensee which are required to have and do have the express approval of the commission. Deleted [The net investment shall be determined in accordance with the provisions of ORS 543.010 to 543.620.] If the sum to be paid cannot be agreed upon by the holder of the license and the municipality or the state, as the case may be, it shall be determined in a proceeding in equity instituted by the state or municipality, as the case may be, in the circuit court of the county in which the major part of the project is located.

"(2) There is also expressly reserved to the state, and any municipality thereof, the right to take over all or any part of any project by condemnation proceedings as may be provided by the laws of Oregon or the charter of any such municipality.

EXHIBIT B
ENERGY & ENVIRONMENT
JAMES FINN
6-30-83
HB 2320

3 pg. exh.

TESTIMONY

HB 2320

JAMES M. FINN

Attorney

Schwabe, Williamson, Wyatt,
Moore & Roberts

Mr. Chairman and members of The Committee, my name is James Finn. I am an attorney with the Portland firm of Schwabe, Williamson, Wyatt, Moore & Roberts and I am appearing today on behalf of our client, The Emerald Peoples Utility District.

I am here today to testify concerning the proposed amendments to HB2320. These amendments would amend ORS 543.610 to remove the definition, now contained in the statute, of the price to be paid by a public utility taking over a dam licensed by the state of Oregon. That definition is net investment, or original cost less depreciation, plus severance damages.

First, I urge you to reject this proposed amendment. There is nothing unfair about either the takeover itself or the price set out in the statute. For example, PP&L, when it obtained its Oregon license for the North Umpqua Dams, knew that this provision was a part of Oregon state law and was a condition contained in the license itself. In other words, PP&L, in exchange for the privilege of using waters of the state which belong to the people of the state of Oregon and making a profit from that privilege, agreed to be subject to takeover during the term of the license by the state or one of its municipalities. PP&L also agreed to be subject to takeover by the federal government at the end of its federal license. This requirement is contained in a federal statute, §807 of the Federal Power Act, which is nearly identical to ORS 543.610. It is, then, fair to require entities like PP&L to live up to the agreement they made when they obtained their state licenses.

Furthermore, it is also fair for the takeover to be at the price which is mandated by this statute, original cost less depreciation. This price compensates PP&L for the cost of its investment in the dam, the building of the dam itself. PP&L has made a profit from the sale of the power derived from this dam on the North Umpqua River, which clearly belongs to the people of the state of Oregon. Thus, to compensate PP&L in excess of its net investment in this unique property would be a windfall. This position has been taken by the Federal Energy Regulatory Commission and the administrative law judge in the Merwin Dam case.

There may also very well be questions about the constitutionality of this proposed amendment to ORS 543.610. This legislation may be an unconstitutional retroactive interference with the rights of the state and municipalities thereof. Third-party beneficiary rights may have already accrued in the state and municipalities, which cannot be overturned by this legislation.

If this Committee is inclined to reject these arguments, then we would suggest a compromise position, which is set out in our proposed amendments. The first amendment would delete net investment as the definition of fair value in section 1 of the statute, but it would also delete any compensation for severance damages for the holder of the license. The purpose of this amendment would be to limit the amount of the windfall that the holder of the license would be obtaining by virtue of the amendment of this statute. In other words, if you choose to let PP&L out of the promise it made in its agreement back in 1947 when it built these projects subject to this license and to this statute, it would be a fair compromise not to award PP&L severance damages, in addition to a higher price for the dam itself.

Finally, our second proposed amendment would simply delete, not only the definition of the price as net investment, but the phrase "fair value" plus severance damages and substitute the phrase "just compensation." This phrase has been interpreted by the Oregon courts and applied by Oregon juries for many years. The insertion of this phrase into the statute would make certain that this Committee and the Legislature would not be endorsing any one method of valuation but would be leaving the choice of the various methods of valuation for this property up to the courts and juries, which are experienced in making that determination. Of course, the

Oregon and Federal Constitutions limit the amount of money that PP&L would be able to obtain for the North Umpqua property, absent this statute, to just compensation. This amendment, therefore, would be insuring that PP&L would not be obtaining a windfall price for the property in excess of what PP&L would be entitled to under the Oregon and Federal Constitutions.

Thank you.