BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 2273

In the Matter of PUBLIC UTILITY COMMISSION OF OREGON, Investigation into House Bill 2021 Implementation Issues	JOINT REPLY BRIEF OF SIERRA CLUB, ROGUE CLIMATE, AND COLUMBIA RIVERKEEPER

Joint Reply Brief of Sierra Club, Rogue Climate, and Columbia Riverkeeper

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I. Introduction

Rogue Climate, Sierra Club, and Columbia Riverkeeper respectfully submit the following Reply Brief in order to respond to specific arguments raised in Opening Briefs regarding the Oregon Public Utility Commission's ("Commission") interpretation of Sections 5(2)(f) (public interest standard), 2 (policy statements), and 4(6) (continual progress) under HB 2021.

II. Argument

A. HB 2021's Public Interest Standard Requires the Commission to Further Define Criterion to Approve Clean Energy Plans ("CEPs").

The majority of parties support the Commission providing guidance on what "other factors" it may consider when determining whether a CEP is "in the public interest.[1] As we addressed in our Opening Brief, because "in the public interest" is a delegative term, the Commission must complete the legislative meaning consistent with the general policy of the statute, in order to be granted deference by a reviewing court.[2] The Commission will need to

[1] *See, e.g.,* Climate Sols. Opening Br. at 3; Or. Solar + Storage Indus. Ass'n Opening Br. at 5-6 (agreeing that the Commission must define delegative terms); Pine Gate Renewables, LLC Opening Br. at 3; Columbia River Inter-Tribal Fish Comm'n Opening Br. at 8

[2] *OR–OSHA v. CBI Services Inc.*, 356 Or. 577, 598 (2014) (remanding agency decision where it was not evident that the agency exercised its delegative authority in the first place and did not offer an explanation of how the legislative policy was applied to reach the decision).

define "in the public interest," then, either in the context of its adjudicative application to a particular CEP or through advanced notice, such as through an order in this proceeding or through a rulemaking. Best practice would be to provide notice of what factors the Commission is likely to find relevant in its public interest determination, as this will allow both the utilities and stakeholders to meet Commission expectations. Providing initial guidance now will not prevent the Commission from considering other factors on a case by case basis, as suggested by others.[3] Instead, the Commission need only identify that the adopted list is not exclusive and provide the requisite explanation for considering an un-listed factor in the adjudicative decision approving or denying a particular CEP.

The Joint Utilities raise three primary arguments to minimize the Commission's authority to consider "any other relevant factors" when evaluating whether a CEP is "in the public interest." None of these arguments should be accepted.

First, the Joint Utilities urge the Commission to find that CEPs are "in the public interest" based solely on factors (a) through (e), arguing that "no additional considerations are required by the statute. . . "[4] In support of this argument, the Joint Utilities point to *CenturyTel*, where the Commission did not consider "other matters" in making a public interest determination and approving CenturyTel's price plan pursuant to O.R.S. 795.255(2).[5] *CenturyTel* is immaterial for at least two reasons. First, in that case, the parties had stipulated that the plan at issue was in the public interest and the decision provides no discussion for why the Commission did not consider "other matters" in its evaluation. Second, the statute at issue in *CenturyTel* is significantly

[3] Or. Citizens Util. Bd. Opening Br. at 19-20 (discouraging adoption of factors because "public interest" determinations are fact based, and choosing factors now will demonstrate others are disfavored); Portland Gen. Elec. Co. and PacifiCorp d/b/a Pac. Power Joint Phase 1 Opening Br. at 4 (factors are better suited to application to specific facts) [hereinafter "Joint Utils. Opening Br."].
[4] Joint Utils. Opening Br. at 6.
[5] *In re CenturyTel Price Plan*, Docket No. UM 1686, Or. Pub. Util. Comm'n Order No. 14-347 (Oct. 7, 2014).

different from O.R.S. 469A.420(2) in structure and intent. Specifically, O.R.S. 759.255, the statute at issue in *CenturyTel*, permits the Commission to consider "other matters" in determining whether a price plan is in the public interest, but it does not list that authority as a directive commensurate with the enumerated factors:

> In making its determination [that the plan is in the public interest] the commission shall consider, among other matters, whether the plan:
>
> (a) Ensures prices for telecommunication services that are just and reasonable;
>
> (b) Ensures high quality of existing telecommunications services and makes new services available;
>
> (c) Maintains the appropriate balance between the need for regulation and competition; and
>
> (d) Simplifies regulation.

In contrast, O.R.S. 469A.420(2) provides:

> In evaluating whether a plan is in the public interest, the commission shall consider:
>
> (a) Any reduction of greenhouse gas emissions that is expected through the plan, and any related environmental or health benefits;
>
> (b) The economic and technical feasibility of the plan;
>
> (c) The effect of the plan on the reliability and resiliency of the electric system;
>
> (d) Availability of federal incentives;
>
> (e) Costs and risks to the customers; and
>
> (f) Any other relevant factors as determined by the commission.

Because "any other relevant factors" is enumerated as a distinct criterion from subsections (a) through (e), the Commission may be required to state whether and why other relevant factors, beyond (a) through (e), were or were not considered, particularly if a party argues that some unenumerated factor applied. Even if the Commission were to determine that no "other relevant factors" required consideration in the evaluation of a particular CEP, there should be no doubt that the Commission may not, in this proceeding or in any other legislative proceeding, determine that there are none or will never be any other relevant factors to consider, because the statute is clear that the Commission must determine if other relevant factors apply

when evaluating a CEP.

Second, the Joint Utilities alternatively argue that if "other relevant factors" are to be considered, they must be "reasonably related" to the factors listed in subsections (a) through (e).[6] The Commission is not so cabined. The Joint Utilities appear to rely upon the statutory construction canon of *ejusdem generis*, which holds that "where general words or phrases follow a number of specific words or phrases, the general words are specifically construed as limited and apply only to persons or things of the same kind or class as those expressly mentioned."[7] But this canon is used to limit general words or phrases to a similar kind or class previously identified in statute. Such is not the case for the factors listed in subsections (a) through (e), which cover a wide range of disparate topics and do not have a common quality or characteristic in which to tether. Even if the Commission was required to limit "other relevant factors" to those related to the factors listed in subsections (a) through (e), doing so would not be difficult. As just one example, should the Commission consider the continued operations of fossil fueled resources in Oregon for out-of-state sales, this factor would be "reasonably related" to the broad categories of environmental and health benefits, feasibility, reliability, resilience, or customer risks.

Finally, the Joint Utilities assert that O.R.S. 469A.420(2)'s public interest directive is unremarkable because a "large number of statutes" require the Commission to consider the public interest.[8] The Joint Utilities fail to acknowledge that determining whether a CEP is in the public interest is one of only *two* criteria that the Commission must assess when acknowledging

[6] Joint Utils. Opening Br. at 6.
[7] Legal Info. Inst., *Ejusdem generis*, Cornell Law School, *available at* https://www.law.cornell.edu/wex/ejusdem_generis#:~:text=Ejusdem%20generis%20(ee%2Djoose%2D,construed%20as%20limited%20and%20apply.
[8] Joint Utils. Opening Br. at 5.

(or not) a CEP.[9] It is significantly different from the other statutes referencing the public interest.[10] House Bill ("HB") 2021's directive is much more akin to the public interest decision-making related to public resources where the "public interest" is often the primary criteria.[11] As pointed out by Oregon Solar + Storage Industries Association, the Commission is now explicitly charged with pursuing societal objectives - social equity, climate change mitigation and inclusion of under represented communities - in regulating greenhouse gas emitting industries. These interests are why HB 2021 is uniquely structured.

As recommended in our Opening Brief and in response to other parties' arguments, the Commission should acknowledge and adopt the following as the first of the non-exclusive list of "other relevant factors" that the Commission will consider in evaluating whether a CEP is in the public interest:

1. Whether public health and safety impacts including non-greenhouse gas emissions from generating facilities, particularly from thermal resources that remain online or are developed (like nuclear resources) outside of Oregon or are in Oregon but serve energy requirements outside of Oregon, have been addressed and mitigated;
2. Whether the public health benefits of energy efficiency measures and household energy storage have been considered and opportunities developed or pursued;
3. Whether the CEP maximizes community energy resiliency, including fostering social cohesion, networks, disaster preparedness and energy workforce development;
4. Whether burdens on natural and Tribal resources, including burdens of mining, production and disposal of materials, and burdens to communities directly impacted by activities negatively impacting natural resources have been considered and mitigated;

[9] *See* O.R.S. 469A.420(2) ("The Public Utility Commission shall acknowledge the clean energy plan if the commission finds the plan to be [1] in the public interest and [2] consistent with the clean energy targets set forth in ORS 469A.410.").

[10] Joint Utils. Opening Br. at 5. On the whole those statutes fall into three categories that are different from the primary "public interest" substantive criteria in subsection 420: 1) statutes providing that the public interest is a reason or an additional reason for the commission to act (ORS 757.140, 757.245, 757.273, 757.412); 2) statutes adding an additional criteria or additional authorization for discretion (for example, reasonableness, fairness and compatible with, relevant to, not contrary to or in the "public interest")(ORS 757.269, 757.415, 757,495, 757.490, 757.511, 757.516, 757.607) and 3) one which characterizes the commissions' approval - e.g., the agreement is enforceable if approved by the Commission as being in the public interest).

[11] *See,* for example, decision-making around public lands (ORS 274.760, 520.240, 270.165, 275.330).

5. Whether impacts to the Columbia River and Tribal treaty rights have been considered and mitigated;
6. Whether the public health benefits of unhindered accessibility to electricity, and the cost and accessibility burdens to environmental justice communities have been considered and maximized or minimized;
7. Whether reasonable opportunities to increase community-owned and operated generation and distribution facilities, including in Tribal communities were allowed, supported, developed and pursued;
8. Whether community input was developed or received and implemented or rejected in the CEP;
9. Whether the CEP assumes an adequate time for non-commercialized resources to become available and a reasonable range of costs for non-commercialized resources; whether modeling relies on realistic assumptions, considers the uncertainty and known risks around interconnection, transmission, permitting, development timelines; and whether a realistic contingency plan is presented;
10. Whether the CEP demonstrates that the electricity delivered to Oregon customers is clean and substantiated by the retirement of associated RECs not used for RPS compliance.

B. Section 2 Policy Statements Should Guide the Commission's Interpretation and Implementation of HB 2021 and Are Not Invalidated by Other State Policies.

Nearly all parties agree that while statutory policy statements are not binding, they should be used to interpret the operative provisions of HB 2021.[12] However, the Joint Utility Opening Brief goes on to suggest that the utilities are not subject to the Section 2 policy statements and that evaluation of their compliance with HB 2021 should be divorced from the policy statements altogether.[13] The Commission should not adopt this approach to Section 2, which would render the section meaningless. Instead, as our organizations noted in our Opening Brief, the Commission should look to the Section 2 policy statements when interpreting ambiguous,

[12] *See, e.g.*, Joint Utils. Opening Br. at 7; Pine Gate Renewables Opening Br. at 3; Nw. Energy Coal. and Renewable Nw. Joint Opening Br. at 11; Climate Sols. Opening Br.; Or. Citizens Util. Bd. Opening Br. at 22-23 (noting that the Commission should generally look to the policy statements to help interpret ambiguous statutory language and that "HB 2021 implementation . . . should be conducted in a manner that ensures HB 2021's policy statements are met.")
[13] Joint Utils. Opening Br. at 9 ("Under HB 2021, utilities meet the overall intent of ORS 469A.405's policy statements by adhering to the HB 2021's specific requirements . . . not by being subject to novel requirements from non-binding, and in this case, conflicting, policy statements.").

inexact, or delegative provisions under HB 2021, particularly when evaluating whether a CEP is "in the public interest."

The Joint Utilities urge the Commission to give no weight to the Section 2 policy statements because Oregon has enacted other climate and energy-related policy statements that may conflict with HB 2021.[14] Simply because Oregon may have additional policy statements regarding climate and energy does not mean that (1) HB 2021's policy statements cannot be harmonized with those other policies; or (2) that the State of Oregon, and this Commission in particular, is not capable of balancing multiple state objectives. Indeed, the Joint Utilities' primary example of supposedly irreconcilable policy objectives—market competition, cost-effectiveness, and prioritizing generation that provides direct benefits to communities—falls flat. There is no reason why the Commission could not evaluate whether the utility placed any value on the fact that certain generation would provide direct benefits to communities in the course of its typical cost analysis. HB 2021's policy directives are intended to achieve precisely this result: incorporation into a typical least-cost, least-risk analysis *other* societal goods.

C. The Commission May Evaluate Whether a Utility is Meeting HB 2021 Compliance and Achieving "Continual Progress" Outside of a Clean Energy Plan Review.

The Joint Utilities argue that the Commission's review of "continual progress" is strictly limited to reviewing the utilities' CEPs and Integrated Resource Plans ("IRPs"), and that requiring annual filings is contrary to the statute.[15] In support of this argument, the Joint Utilities assert that ORS 469A.415(6), which requires the Commission ensure "continual progress," is specific to IRPs and CEPs because subsection 415(6) cross-references subsection 415(4)(e), listing requirements for clean energy plans. However, subsection 415(6) is not merely a

[14] Joint Utils. Opening Br. at 8-9.
[15] Joint Utils. Opening Br. at 12-13.

restatement of subsection 415(4)(e)'s requirements, but includes additional obligations for the Commission. Specifically, while subsection 415(4)(e) requires a CEP to demonstrate continual progress toward meeting the greenhouse gas emission reduction targets within the planning period, subsection 415(6) directs the Commission to require a demonstration of continual progress as described in 415(4)(e) **and** that the utility is taking actions as soon as practicable that facilitate the rapid reduction of emissions at reasonable costs to retail customers. Subsection 415(6), then, authorizes more than what 415(4)(e) already requires. As it states, the Commission shall require continual progress, not only in meeting the targets but also taking actions as soon as practicable that facilitate the rapid reduction of emissions at reasonable costs to retail customers. It thus authorizes discretion to ensure that progress outside of the review of a CEP and outside of the two-year planning period is occurring. The statute does not cabin the Commission's discretion to simply reviewing the CEP's statement of continual progress every two years. Otherwise subsection 415(6) means nothing. Under general principles of statutory construction, every word and every provision should be given effect, and the statute should not be interpreted as to give any provision no meaning.[16] The Joint Utilities' reading of HB 2021, however, would make subsection 415(6) redundant with subsection 415(4)(e) and thus obsolete.

III. Conclusion

For the reasons set forth above, Rogue Climate, Sierra Club, and Columbia Riverkeeper recommend that the Commission issue an order in this proceeding further defining what "other relevant factors" it will consider in evaluating whether a CEP is in the public interest; rely on HB 2021 Section 2's policy statements to guide the Commission's interpretation and implementation

[16] *See, e.g., Dish Network Corp. v. Dep't of Revenue*, 364 Or. 254, 278 (2019) ("We begin our analysis by acknowledging the validity of the principle underlying those arguments—that, if possible, we should avoid interpreting statutory enactments in a way that makes parts of them superfluous or redundant.").

of HB 2021; and exercise its broad authority, as necessary, to ensure that the utilities demonstrate "continual progress" in meeting HB 2021's objectives.

Respectfully submitted,

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