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August 21, 2023

***Via Electronic Filing***

Public Utility Commission of Oregon
Attention: Filing Center
201 High Street SE, Suite 100
Salem, OR 97301-3398

**Re: Docket UM 2273 – In the Matter of Public Utility Commission of Oregon's Investigation Into House Bill 2021 Implementation Issues**

Dear Filing Center:

Portland General Electric Company (PGE) encloses for filing the Joint Response Brief of PacifiCorp d/b/a Pacific Power and Portland General Electric Company in the above captioned docket.

Sincerely,

**Portland General Electric Company**

*/s/ Brendan J. McCarthy*
Brendan J. McCarthy
Assistant General Counsel III

**PacifiCorp d/b/a/ Pacific Power**

*/s/ Zachary Rogala*
Zachary Rogala
Senior Attorney

BJM:bp

Enclosure

**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

**UM 2273**

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| In the Matter of<br><br>PUBLIC UTILITY COMMISSION OF OREGON,<br><br>Investigation Into House Bill 2021 Implementation Issues. | Portland General Electric Company and PacifiCorp d/b/a Pacific Power Joint Phase 1 Response Brief |

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## I. INTRODUCTION

Portland General Electric Company (PGE) and PacifiCorp d/b/a Pacific Power (PacifiCorp) (the Joint Utilities) respectfully submit this joint brief in response to the Utility Commission of Oregon (OPUC or Commission) request for briefing on select questions of law and policy in Commission Order No. 23-194.[1]

Specifically, the Joint Utilities respond to legal and policy arguments[2] submitted by Green Energy Institute (GEI), Oregon Solar + Storage Industries Association (OSSIA), Sierra Club, Rogue Climate, Columbia Riverkeeper, and Coalition of Communities of Color (Joint Advocates), Columbia River Inter-Tribal Fish Commission (CRIFTC), NW Energy Coalition and Renewable Northwest (NWEC), and NewSun Energy LLC (NewSun),[3] and select arguments from Climate Solutions and Pine Gate Renewables, LLC (Pine Gate).[4]

As discussed below, the Joint Utilities argue: there is general agreement on discrete issues that the Commission could address either in UM 2273 or future proceedings; renewable energy credits (REC) are not relevant to HB 2021; neither the Commission's general powers nor supplemental authorities allow intervenors to re-write HB 2021; and the Commission has significant experience implementing public interest standards.

## II. THERE ARE DISCRETE AREAS OF AGREEMENT THAT THE COMMISSION COULD ADDRESS EITHER IN UM 2273, OR FUTURE COMMISSION WORKSHOPS

As an initial matter, the Joint Utilities note that there is general agreement between certain parties, on certain issues:

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[1] *In re Commission HB 2021 Investigation*, Docket No. UM 2273, Order No. 23-194 (Jun. 5, 2023).

[2] The Joint Utilities object to all statements that discuss the Commission's June REC workshop (e.g., GEI Opening Brief at 5, 11, 12, 15, 16, 22, 23; NWEC Op. Br. at 7). The workshop was not noticed as an evidentiary hearing, transcribed, nor were presenters under oath, subject to cross-examination, or any statements received into evidence. These are non-evidentiary representations that are not part of the contested case and cannot be considered. ORS 183.413 and OAR 860-001-0570 (requiring notice of evidentiary hearing); *Patton v. State Bd. Of Higher Ed.,* 59 Or.App. 477, 651 P.2d 169 (1982) (lack of statutory notice required vacating decision, and remand to reopen hearing); *Woolstrum v. Board of Parole and Post-Prison Supervision,* 141 Or.App. 332, 918 P.2d 112 (1996) (same); OAR 860-001-0450 (requiring evidence to be admitted); ORS 756.558(1) (requiring Commission to close the record).

[3] The Joint Utilities do not respond to arguments included in the six interested person comments that were also submitted on July 24, 2023. Interested persons are not parties in contested case proceedings, may not file briefs, and may not present evidence for the record. OAR 860-001-0300(7); Commission ALJ Memorandum (Jul. 7, 2023) (noting that interested persons do not have "the rights of party in this docket."). Accordingly, any arguments made by these parties may carry no weight in the Commission's deliberations.

[4] Neither Climate Solutions nor Pine Gate appear to be represented by Oregon-licensed attorneys, nor attorneys allowed to appear *pro hac vice* in this proceeding. Accordingly Climate Solution's argument III(B) (e.g., arguing Oregon Attorney General policy statements "carries some weight" regarding how the Commission should interpret HB 2021's policy statements), and Pine Gate's argument II(B) (e.g., arguing that HB 2021 policy statements require a "higher burden of proof," whether the Commission is "required to or not"), comprise legal arguments under OAR 860-001-0320(1), and exceed the limits permitted by ORS 183.457(3)(a)-(e).

- NWEC, NewSun, and the Joint Utilities agree (and CUB does not oppose), that the Commission should investigate cost cap issues in the near term to potentially avoid confusion or *ad hoc* implementation if and when the cost cap provisions are raised.[5] The Joint Utilities recommend a process similar to UM 2225 to address this issue: with Commission or Staff-led workshops, and legal briefing on the interpretation of any issues of law, resulting in Commission guidance. This guidance can then inform implementation of the cost cap, and would not necessarily confine the Commission or parties to those interpretations if future facts and circumstances require the Commission to reach a different conclusion or interpretation. In the future, the Commission could consider memorializing the guidance in a rulemaking proceeding.

- CUB and the Joint Utilities agree with the Commission that it has significant discretion to interpret HB 2021's public interest factors, and these factors may be better suited to discuss after review of the initial CEPs.[6] Importantly, the Joint Utilities agree with CUB that HB 2021 transforms "business-as-usual utility regulation,"[7] and also with CRITFC that it is vital that the Joint Utilities consult with CRITFC's member tribes when implementing HB 2021,[8] because the law requires that CEPs "will be developed and acknowledged with an environmental justice lens and expectation of public input."[9] It is "incredibly important to heed the requests of representatives of communities and interests historically marginalized from utility regulatory decision-making," and similar to CUB, the Joint Utilities "would not hesitate to participate in any future proceeding" as the Commission determines necessary to address these concerns.[10]

- NWEC and the Joint Utilities generally agree that the Commission cannot require an in-state preference—either directly or by implication through some sort of work-around created by the policy statements in HB 2021.[11] This is promising, and narrows the scope of contested issues to legitimate questions of law.

While the Joint Utilities do not agree that it is necessary for the Commission to provide additional guidance on HB 2021's public interest factors (including determining what continual progress or economic feasibility require), or create annual compliance mechanisms as this time, the Joint Utilities appreciate the Intervenor's positions on these issues, and look forward to continuing these discussions.

## III. RECS ARE NOT RELEVANT TO HB 2021

[5] NWEC Opening Brief at 15; Joint Utilities Opening Brief at 15–17; NewSun Opening Brief at 15–16; CUB Opening Brief at 23.
[6] CUB Op. Br. at 17–22; Joint Utilities Op. Br. at 4–6.
[7] CUB Op. Br. at 20.
[8] CRITFC Op. Br. at. 2–3, 22.
[9] CUB Op. Br. at 20.
[10] *Id.* at 21–22.
[11] NWEC Op. Br. at. 12–14.

The primary contested issue in this proceeding is whether the Commission should interpret HB 2021 to require additional accounting, reporting, or retiring of RECs to substantiate utility emissions claims. The Commission should decline to re-write HB 2021, and disregard arguments suggesting otherwise, because: the text of HB 2021 is clear; GEI's arguments are incorrect; and statutory interpretation does not include third-party pamphlets, suspect threats of litigation, or policy arguments.

## A. The Commission should decline suggestions to re-write HB 2021.

There is no basis to interpret ORS 469A.400 through 469A.475 to require reporting, accounting, or retiring of RECs to comply with HB 2021. The text and context of the statute demonstrate that RECs are not relevant, and the majority of the parties that negotiated HB 2021 are either silent on the issue, or agree that RECs are not required.[12]

Prior to addressing the arguments for REC-retirement directly, it is important to provide context for what would be required to retire RECs under HB 2021 by examining other state programs that actually considered and required REC retirement. These comparisons highlight how myopic the push to retire RECs as part of HB 2021 is and just how substantially the Commission would need to re-write HB 2021 to accomplish that purpose.

### *i. What would be required to retire RECs under HB 2021?*

GEI provides helpful examples of other state laws that have similar purposes as HB 2021. Fortunately, these comparisons highlight the lack of support for a REC requirement in HB 2021, and beg the question: What exactly would need to be inserted in HB 2021 to conclude it has anything to do with RECs?

Quite a bit. Start with GEI's examples. By statute, Colorado requires utilities to demonstrate compliance with the state's 100 percent clean energy standard by retiring "renewable energy credits . . . in the year generated, by any eligible energy resources used to comply with the requirements of this section."[13] Similarly, by statute, compliance with Washington's greenhouse gas neutrality standard "must be verified by the retirement of renewable energy credits," that "must be tracked and retired in the tracking system selected by the department."[14] However utilities can use "unbundled renewable energy credits" to comply with up to 20 percent of this annual compliance obligation,[15] and the law includes over two

[12] Climate Solutions Opening Brief (lead negotiating party for the environmental community during the 2021 legislative session, and offers no opinion on the matter); NWEC Op. Br. at 3 (the brief "does not directly address Renewable Energy Certificates"); CUB Op. Br. at 13 ("it is clear that HB 2021 was never intended to use RECs for RPS compliance."); Joint Utilities Op. Br. 1-4 (same); *but see* OSSIA Op. Br. at 2–4 (arguing that the Commission should require retiring RECs). GEI was not involved with HB 2021 negotiations.
[13] Co. Rev. Stat. § 40-2-125.5(3)(a)(III).
[14] 2019 Wa. Laws Ch. 288, § 4 (codified at RCW 19.405.040(1)(c)).
[15] *Id.* (codified at RCW 19.405.040(1)(b)(ii)).

dozen specific new legislative enactments that specifically address RECs.[16] Similarly, by statute, California's 100 percent RPS requires RECs to verify compliance.[17]

It makes sense that these other states' laws require RECs, because each focuses on the technology used to generate electricity. In contrast, HB 2021 focuses on the emissions associated with electricity. While both types of laws may have similar purposes (combatting climate change), they use different compliance mechanisms to achieve that result, and therefore require different methods to determine if utilities have met those requirements.

Against this backdrop, the clarity of HB 2021 is notable. Renewable energy credits or certificates are not mentioned anywhere in HB 2021.[18] And as noted by CUB, the legislative history provides strong evidence that RECs were not contemplated for compliance purposes.[19] If there was any remaining doubt, where compliance is based on RECs, such as in Oregon's RPS, the legislature included numerous statutory references that detail exactly how RECs will be used for compliance – it did not leave such a monumental decision up to an agency.[20]

The Commission should heed GEI's examples, and conclude that because Oregon omitted any references to the role of RECs for compliance with HB 2021—especially in contrast to Colorado, Washington, California, and Oregon statutes that explicitly define and describe the role of RECs—that the omission was intentional.[21] Otherwise, the Commission would need to utilize its rulemaking powers to backfill this gap, and as discussed below, the Commission should decline to rely on its general powers to do so.

*ii. GEI's ten arguments are incorrect.*

Moving to the merits, GEI puts forward ten arguments that support retiring RECs to comply with HB 2021.[22] None are correct. The Joint Utilities address several of the most egregious below.

GEI argues that the words "clean," "clean energy plan," or "clean energy targets" in HB 2021 require utilities to retire RECs to comply with the law.[23] This argument ignores the fact that RECs are not discussed in the statute, and that each target is focused on the relevant "baseline emissions level" and not "clean energy." The Joint Utilities suggest that "clean" in each instance is more reasonably interpreted as a synonym for the intended result of HB 2021 (a clean energy

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[16] *Id.* §§ 28–29 (codified at RCW 19.285.030, .040).
[17] Cal. Pub. Util. Code § 399.12(h) (defining RECs); § 399.13 (requiring RECs from eligible renewable energy resources).
[18] Note, HB 2021 § 20 amended ORS 757.603, and § 24 amended ORS 469A.005, to incorporate revised definitions of renewable energy certificates for customer-supported renewables. These provisions are not at issue for HB 2021's clean energy targets in §§ 1–17.
[19] CUB Op. Br. at 14-15.
[20] *See, e.g.,* ORS 469A.005(2), (4), (14), ORS 469A.070, ORS 469A.130, 469A.132, 469A.135.
[21] The Commission should also ignore GEI's statements that PacifiCorp "understands the potential for double counting, the resulting consequences of double counting, and how to address it," (GEI Op. Br. at 13) because it is unclear how rulemaking comments implementing CETA which explicitly require RECs to comply with the law are relevant to HB 2021, which does not discuss RECs. *See* ORS 174.010: do not insert what has been omitted.
[22] GEI Op. Br. at 9–15.
[23] *Id.* (discussing ORS 469A.410(1), ORS 469A.415, and ORS 469A.420).

system results from reducing emissions), as opposed to GEI's interpretation that the noun "clean" requires the Commission to create an entirely new compliance regime (retiring RECs), even though the text of HB 2021 is silent on the issue.[24]

Next, GEI argues that HB 2021's reference to retail customers or retail load in various instances, requires utilities to retire RECs to comply with the law.[25] Even read liberally, eliminating greenhouse gas emissions "associated with serving Oregon retail electricity customers,"[26] or when considering additional emissions are "necessary to meet load,"[27] does not require retiring RECs. Instead, the language is focused on actual emission reductions as opposed to the paper reductions that result from REC retirement.[28] The more reasonable interpretation is that these phrases merely focus HB 2021 on which greenhouse gas emissions utilities need to reduce. This language serves as a limiting function: Only the slice of emissions associated with energy used to serve Oregon customers matter.

Thirdly, GEI argues that HB 2021's language that prohibits tracking electricity to retail customers, and that for compliance purposes, electricity shall have the emission attributes of the underlying generator, actually requires utilities to retire RECs to comply with the law.[29] It is unclear how these interpretations are reasonable, when RECs are not mentioned anywhere in both statutes. Putting that aside, GEI focuses on the wrong issue: HB 2021 is focused on emissions, not on counting RECs.[30] To highlight the point, the DEQ will measure emissions under ORS 468A.280,[31] which requires reporting and registration by any person who "emits greenhouse gases" in Oregon.[32] The statute only mentions RECs in a single instance – and it specifically allows utilities to report market purchases where the associated RECs have been sold

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[24] Oregon courts note that if a statutory interpretation results in two or more plausible readings, "the court will refuse to adopt the meaning that would lead to an absurd result that is inconsistent with the apparent policy of the legislation as a whole." *State v. Vasquez-Rubio*, 323 Or. 275, 282-83, 917 P.2d 494 (1996). See also *Public Citizen v. U.S. Dept. of Justice*, 491 US 440, 454, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989), *citing Church of the Holy Trinity v. United States*, 143 US 457, 459 (1892) ("Frequently words of general meaning are used in statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."). The Joint Utilities believe that the policy of HB 2021 "as a whole" is clear: to eliminate GHG emissions as stated multiple times in the statutory schema and not to create a new requirement for REC retirement out of whole cloth.

[25] GEI Op. Br. at 9–15 (discussing ORS 469A.400(1), ORS 469A.405(1), and ORS 469A.435).

[26] ORS 469A.405.

[27] ORS 469A.435.

[28] A fact that GEI acknowledges could be lost if RECs were required as RECs carry the "legal right to claim its energy as having a zero-emissions attribute even if the buyer's energy was generated from an emitting source." GEI Op. Br. at 16. This means that in a REC-compliant framework, emitting energy could be reported as non-emitting, which is anathema to the purposes of HB2021. As NewSun notes "Climate change is not mitigated by self-serving statements made on paper; it is mitigated by actual reductions in GHG emissions." NewSun Opening Brief at 9.

[29] GEI Op. Br. at 9-15 (discussing ORS 469A.410(2) and ORS 469A.430).

[30] ORS 469A.430 ("For the purposes of determining compliance . . . electricity shall have the emission attributes of the underlying generating resource.").

[31] ORS 469A.420(1)(b).

[32] ORS 468A.280(1)(a).

or transferred.[33] This is fatal to GEI's arguments, because it means that HB 2021's compliance regime is built on a statute that, as a matter of law, is agnostic to the disposition of RECs.

Lastly, GEI argues that the focus on environmental justice in ORS 469A.425 requires utilities to retire RECs, because to do otherwise would force certain communities to "experience the same pollution and negative health outcomes as they have in the past but will be unable to claim the energy they use is clean."[34] It is unclear how ORS 469A.425, which directs utilities to (a) create community advisory groups; (b) file reports that assess community benefits and impacts; and (c) engage the groups on how to implement HB 2021, is relevant to determining how the DEQ must verify emissions under ORS 469A.420, or how the Commission must determine compliance under ORS 469A.435. Even assuming it were, this is not a serious argument. The clerical function of retiring RECs does not impact the health or pollution outcomes of any specific customer or community. Regardless how the Commission interprets HB 2021 (either as the Joint Utilities or as GEI request), the exact same emissions reductions will result. These statutory emissions reduction requirements are not somehow increased or strengthened if RECs were required to be retired.

### B. It is irrelevant whether HB 2021 is a generation or load-based standard.

Some parties urge the Commission to view HB 2021 through an interpretative lens: If HB 2021 is generation-based (measuring actual emissions), then RECs are likely not required for verifying compliance; if the law is load-based (delivering electrons to customers), then RECs are required for verifying compliance.[35] This view relies on a guide created by CRS (or party *ipse dixit*),[36] and based on this presumption GEI offers *a priori* rationalizations of HB 2021 to sleuth out whether the law is generation or load-based.[37] The Commission should disregard these arguments.

Oregon's Legislative Assembly has the power to enact statutes that govern conduct in Oregon, and is not bound by non-profit whitepapers or policies from other states.[38] Interpreting statutes requires a three-step process (start with the text, refer to legislative history as needed, and consider maxims of statutory construction).[39] Yet no party cites any text from HB 2021,

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[33] ORS 468A.280(4)(a)(D)(iii).
[34] GEI Op. Br. at. 13-14.
[35] GEI Op. Br. at 4–24; NWEC Op. Br. at 7–8; OSSIA Op. Br. at 2–3.
[36] GEI Op. Br. at 5, n. 16 (*citing* Center for Resource Solutions, *Guide to Electricity Sector Greenhouse Gas Emissions Totals* (Nov. 2022) (available here: https://resource-solutions.org/document/110322/); *Id.* at 16, n. 83 (same). *See also* OSSIA Op. Br. at 2 ("OSSIA is supportive of the REC arguments laid out in the Green Energy Institute's Opening Brief."), CRITFC Op. Br. at 5 (supporting comments made by CRS in UM 2225), Pine Gate Renewables Op. Br. at 2 ("PGR is unconvinced that the 'generation-based' methodology assuages concerns of double counting"), NewSun Op. Br. at 7 ("the Commission should adopt rules requiring utilities to retire RECs."), MCAT Op. Br. at 2 ("MCAT's conclusion after reviewing the GEI Opening Brief ...).
[37] *See, e.g.,* GEI Op. Br., at 9 ("Ten separate statutory provisions . . . provide insight into the load-based framework the Oregon legislature created to achieve the clean energy targets.").
[38] Or. Const. Art. IV, § 1.
[39] *State v. Gaines,* 346 Or. 160, 206 P.3d 1042, 1050-1051 (2009).

legislative history or context, rules of statutory construction or other Commission authority that support interpreting HB 2021 based on this generation- or load-based framework.

Nor could they. Even if third-party documents were relevant, documents published nearly a year and a half after passage of HB 2021 are decidedly not appropriate for the Commission to consider in interpreting the law.[40] Further, the Joint Utilities are not aware of any examples from the 2021 Legislative Assembly (including the plain language of HB 2021, legislative history, and relevant context, including the DEQ's reporting requirements that underpin HB 2021) where this generation- or load-based concept was either discussed or informed Legislative deliberations.[41]

There are also evidentiary concerns with relying on third-party documents. Because there has not been an evidentiary hearing, there is no evidentiary record in this docket. Yet even if GEI sought to introduce this document through subsequent prefiled direct testimony, the Commission should decline to review it: experts can only testify to factual issues;[42] are prohibited from providing legal conclusions (which necessarily includes interpreting statutes);[43] and learned treatises by themselves "are not admissible as substantive evidence" (they may only be used to impeach witnesses).[44]

Statutory interpretation does not include third-party pamphlets, especially those produced after adoption of HB 2021, and the Commission should decline to interpret HB 2021 through this false dichotomy.

### C. Threats of litigation from potential double-claiming are unpersuasive.

It is too risky, some parties argue for the Commission to conclude that HB 2021 is a generation standard. That's because, they claim, subsequent utility marketing claims could result in double-counting, double-claims or even enforcement actions based assumed double-claiming causes of action under the Federal Trade Practice Act of 1914 (FTPA), Washington's Consumer Protections Act (CPA), or Oregon's Unlawful Trade Practices Act (UTPA).[45]

These arguments are misplaced. HB 2021 is focused on limiting greenhouse gas emissions.[46] Compliance is determined by determining absolute tons of carbon dioxide equivalent emissions in any given year.[47] This is a separate and distinct question from counting megawatt-hours generated from renewable resources (which HB 2021 does not require). Further,

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[40] *See*, e.g., GEI Op. Br. at fn. 16, 83 (citing to CRS publication from November 2022).
[41] *Contra* NWEC Op. Br. at 8 (discussing Max Greene testimony regarding whether HB 2021 imposed a proof of delivery standard, and finding that it does not).
[42] ORS 40.410 (Or. Evid. Code Rule 702) ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.").
[43] ORS 40.420 (Or. Evid. Code Rule 704); *United States v. Diaz,* 876 F.3d 1194 (9th Cir. 2017); *Hangarter v. Provident life & Accident Ins. Co.,* 373 F.3d 998, 1016 (9th Cir. 2004).
[44] ORS 40.430 (Or. Evid. Code 706); *Travis v. Unruh,* 66 Or. App. 562, 674 P.2d 1192, 1193-1194 (1984).
[45] NewSun Op. Br. at 7, OSSIA Op. Br. at 2, Pine Gate Renewables Op. Br. at 2, CRITFC Op. Br. at 5–6, GEI Op. Br., at 18–21.
[46] ORS 469A.410.
[47] ORS 469A.420.

HB 2021 does not regulate what any party does with associated RECs from renewable generation. Accordingly, there can be no double-counting cause of action under HB 2021 when the Joint Utilities are only reporting generation from specific resources or the market to DEQ, which is then translated into emissions data.

Consider examples that highlight this distinction. The Joint Utilities will use RECs generated from *renewable resources* to comply with Oregon's RPS, while reporting total generation from *emitting resources* to DEQ, ultimately determining if associated emissions meet HB 2021's targets. This means that the Joint Utilities could comply with HB 2021 by relying on non-emitting resources or technologies that have nothing to do with RECs: nuclear, demand response, energy efficiency, legacy hydropower, various storage facilities, improved transmission and distribution line performance through superconductivity, to name a few. All of these strategies would reduce the MWs from emitting resources reported to DEQ, either by displacing emitting generation or overall load reduction. Yet none would produce RECs. There can be no double-claim when the Joint Utilities are not claiming any attribute from renewable resources to comply with HB 2021. These examples illustrate that GEI's double-counting concern points the wrong direction: HB 2021 is focused on counting emissions, not green energy meter-reading.

Second, consider state and federal consumer protection authorities. As an initial matter, Washington's CPA does not apply to utilities.[48] Similarly, Oregon's UTPA exempts conduct that is based on compliance with agency statutes, regulations, or orders.[49] It is unclear how reporting emissions associated with emitting generation to explicitly comply with the text of HB 2021, DEQ regulations, and Commission orders could give rise to a UTPA claim.

Moving to the federal level, it is unlawful to engage in "unfair or deceptive acts or practices" under the FTPA.[50] Relevant here, the FTC adopted Guides for the Use of Environmental Claims, which include agency guidance on renewable energy claims.[51] The guides "do not confer any rights on any person and do not operate to bind the FTC or the public,"[52] because they are only interpretive rules.[53] They "do not preempt federal, state, or local

[48] RCW § 19.86.170 ("Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, *the Washington utilities and transportation commission*, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States . . .") (emphasis added); *Tanner Elec. Co-op v. Puget Sound Power & Light Co.,* 128 Wash.2d 656, 911 P.2d 1301 (1996).
[49] ORS 646.612(1).
[50] 15 U.S.C. 45(a)(1).
[51] 16 CFR § 260.15.
[52] 16 CFR § 260.1(a).
[53] *State v. Amoco Oil Co.,* 97 Wis.2d 226, 293 N.W.2d 487, 495 (1980) ("Guides, unlike substantive rules, do not have the force and effect of law; the Guides are not the equivalent of a statute."); *Allis-Chalmers Mfg. Co. v. White Consol. Indus. Inc.,* 414 F.2d 506, 524 (3d Cir. 1969) (FTC guides "do not purport to be a concise statement of the present status of the law which the courts are bound to follow.").

laws,"[54] however compliance with state authorities "will not necessarily preclude Commission law enforcement action under the FTC."[55]

To the Joint Utilities' knowledge, the FTC has never initiated an enforcement action based on utility renewable energy marketing claims. And in the one instance where the FTC issued a pre-enforcement letter on the issue, the FTC declined to prosecute after reviewing the utility response.[56] And on the exact issue in a collateral proceeding, the Connecticut Public Utility Commission similarly declined to move forward.[57] This was reasonable, not only because the FTC has exclusive jurisdiction to investigate and prosecute violations of the Act,[58] but also because the FTPA does not create a private cause of action before state courts or utility commissions.[59]

It is unclear how the FTC's green guides warrant any more Commission consideration when interpreting what HB 2021 requires. If anything, similar to Connecticut, the Commission can observe that the FTC has articulated its general double-counting principles, and that the Commission expects utilities to act consistent with federal law—just as Joint Utilities have and will continue to do so.[60] The Joint Utilities are well-aware of the risks associated with making unsupported environmental claims, and work to ensure that environmental impacts and renewable attributes are correctly disclosed and clearly defined.[61]

Finally, two points are particularly relevant. The first is that any litigation on these issues would be heavily fact dependent, and not ripe for Commission consideration until after HB 2021's first decarbonization target in 2030. Second, either double counting has been actionable since 2009, when DEQ's regulations were first adopted,[62] or the supposed cause of action is

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[54] 16 CFR § 260.1(b).
[55] 16 CFR § 260.1(b).
[56] *In re Green Mountain Power,* FTC Staff Response Letter at 1, 2015 WL 628252 (Feb. 5, 2015; FTC) ("As detailed below, we are concerned that GMP may not have clearly and consistently communicated the fact that it sells Renewable Energy Certificates (RECs) to entities outside of Vermont for most of its renewable generating facilities and, as a result, may have created confusion among Vermont electricity customers about the renewable attributes of their electricity. Although no findings have been made that these claims violate the law, we urge GMP in the future to prevent any confusion by clearly communicating the implications of its REC sales for Vermont customers and REC purchasers.").
[57] *In re REC Double Counting Decl. Rul. Pet.,* 2015 WL 1400528 (Conn.D.P.U.C.; Mar. 25, 2015).
[58] 15 U.S.C. 57(b).
[59] *See, e.g., White v. Kroger Co.,* 2022 WL 888657, *2 (N.D. Cal. 2022) ("While neither the FTC guides nor the California statute directly creates a private cause of action . . .").
[60] *REC Dec. Rul. Pet,* 2015 WL 1400528, * 11 (The Commission found that the "FTC's Division of Enforcement issued a letter that articulates double-counting principles, and expects Green Mountain Power to adhere to those principles.").
[61] *See*, *e.g.*, PGE's Understanding your power options pricing plans brochure ("Some or all of the renewable energy attributes associated with our power supply mixes may be sold, claimed or not acquired.") (available here); PGE's 2023 Green Future Enterprise prospective product content label (containing similar disclaimers regarding the basic mix underlying the unbundled REC programs) (available here).
[62] ORS 468A.280(4)(D)(iii) (Utilities must report an "estimate of the amount of greenhouse gas emissions . . . attributable to . . . Electricity purchases for which a renewable energy certificate under ORS 469A.130 *has been issued but subsequently transferred or sold to a person other than the electric company*.") (emphasis added). The Joint Utilities acknowledge that DEQ regulations do not require this reporting category. [63] NewSun Op. Br. at 7–8; OSSIA Op. Br. at 3–4; GEI Op. Br. at 15, 17; CRIFTC Op. Br. at 8; Pine Gate Renewables Op. Br. at 2–3.

suspect. The lack of double-counting lawsuits (or even public claims of such double-counting from the same advocates in this docket) in Oregon based on over a decade of utility reporting should resolve this question.

The Joint Utilities urge the Commission to not let the tail wag the dog on this issue, especially when based on suspect causes of action that, even if actionable, are over half-a-decade away.

**D. Policy arguments regarding customer impacts from the sale of RECs are misguided.**

Several parties argue that there are strong policy justifications for interpreting HB 2021 to require retiring RECs for compliance purposes. For example, the Commission must require REC retirement to prevent utilities from illicitly selling RECs off-the-books, issuing windfall dividends to shareholders and harming customers in the process, or in the alternative require specific accounting of REC sales to mitigate customer harm.[63]

These arguments are offensive because they imply utility malintent without factual support, and because they misrepresent existing Commission REC practice and authority. Existing authorities already require broad reporting of utility REC retirements, sales, and purchases, and in some cases require earnings review and sharing mechanisms.[64] This includes long-standing Commission IRP guidance,[65] long-standing RPS requirements,[66] recently expanded CEP guidance,[67] and the fact that RECs are issued, monitored, accounted for and transferred by or through WREGIS,[68] and monitored by the Commission.[69] The Commission has also shown it has plenary authority to protect customers in regards to the value of RECs and the Joint Utilities expect that it will continue to do so.

Even if the parties were correct, implementing a REC-based standard is not the right "fix." Rather, the correct fix is more of what the Commission has already imposed in terms of

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[63] NewSun Op. Br. at 7–8; OSSIA Op. Br. at 3–4; GEI Op. Br. at 15, 17; CRIFTC Op. Br. at 8; Pine Gate Renewables Op. Br. at 2–3.
[64] *See, e.g.*, Docket No. UE 115 and Docket No. RE 65 regarding tradable renewable credits, and Tariff Schedule 126, annual power cost update, including an earnings review and sharing mechanism.
[65] *See, e.g.,* PacifiCorp's 2023 Amended Final IRP, Docket No. LC 82 at 76-82, 364-365 (May 31, 2023) (discussing existing REC practices).
[66] ORS 469A.070.
[67] *In re Commission HB 2021 Investigation,* Docket No. UM 2225, Order No. 22-446, at 24, 28 (Nov. 14, 2022); *see, e.g.,* PacifiCorp's 2023 CEP, Docket No. LC 82 at 82–84 (May 31, 2023) (discussing CEP-relevant REC practices).
[68] OAR 330-160-0020 (1).
[69] *See, e.g. In re PGE's 2018 Renewable Portfolio Standard Compliance Report*, Docket No. UM 2016, Order No. 19-315 (Sept. 16, 2019) (discussing annual Commission review of utility REC practices); *see also* Joint Utility Response to Application for Rehearing or Reconsideration at 8 ("More importantly, IRPs and IRP updates already include a forecast of RECs allocated to Oregon, itemized by their treatment. There is additional transparency into actuals in the Joint Utilities' annual RPS reporting, biannual renewable portfolio standard implementation plan, and annual filings to the OPUC that detail REC supply for voluntary programs. To the extent that stakeholders have concerns with alleged "double-counting," there is ample information already provided. Further, Western Renewable Energy Generation Information System was established to ensure that RECs cannot be double counted.").

reporting, tracking and accounting for REC sales.[70] The Commission should disregard these arguments and instruct parties that, consistent with the Oregon Rules of Professional Conduct, naked accusations of malfeasance have no place in this docket.[71] Neither the Commission's general powers nor supplemental Oregon authorities provide authority to require REC retirement.

## IV. NEITHER THE COMMISSION'S GENERAL POWERS NOR SUPPLEMENTAL OREGON AUTHORITIES ALLOW INTERVENORS TO RE-WRITE HB 2021

Several parties also argue that the Commission's general powers and supplemental authorities allow the Commission to require REC retirement.[72] The Commission should decline these invitations. The Commission's regulatory powers throughout Chapter 756 generally, and ORS 756.040 specifically, are "sweeping."[73] But these general powers do not preempt the specific language in HB 2021.[74]

Similar arguments discredit relying on Executive Order 20-04. It is unclear how an executive order that implements Oregon's greenhouse gas emissions reduction goals in ORS 468A.205 (not ORS 469A.400 et seq.),[75] a statute that (1) "does not create any additional regulatory authority for an agency of the executive department" (which includes the Commission);[76] (2) whose reductions targets were created prior to HB 2021's (and are now superseded by HB 2021 higher requirements);[77] and (3) does not discuss renewable energy credits, is relevant to the Commission's implementation of HB 2021.

Taken together, neither the Commission's general powers nor its supplemental authorities provide authority to overlook the plain language of HB 2021 and require the retirement of RECs.

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[70] Indeed, it is possible that a REC-based standard could harm customers if RECs were required to be retired for HB 2021 compliance where there was a higher and better use of such RECs.
[71] OR. R. Prof. Cond. 3.3(a)(1) ("A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;").
[72] GEI Op. Br., at 4-5 (arguing the Commission's general powers of oversight in ORS 756.040, and Oregon Executive Order 20-04 require the re-write); NewSun Op. Br. at 4-7 (arguing ORS §§ 756.040(1), 756.040(2), 756.060, 756.062(2), 756.160(1), 756.160(2), 756.160(3), 756.180, 756.500, 756.512, 756.515, 756.990, 469A.415(6), 469A.420(2), and 439A.435 support the re-write); NWEC Op. Br. at 4-7 and CRITFC Op. Br. at 7 (both relying on ORS 756.040.
[73] *Gearhart v. OPUC,* 356 Or. 216, 339, P.3d 904, 921 (2014).
[74] ORS 174.020(2) (when a general and a specific statute conflict, the specific controls); *Martyr v. State,* 130 Or.App. 528, 883 P.2d 237, 239 (1994) ("To the extent that there is any inconsistency between the general language in ORS 161.327, ORS 161.341(1) and ORS 426.072 about the division's statutory duty to provide treatment to mentally ill persons committed to its care, and the specific language in ORS 426.385(1)(a) about the right to communicate freely by sending sealed mail, the latter must control. See ORS 174.020."); *State ex. Rel. Adams v. Powell,* 171 Or.App. 81, 15 P.3d 54, 57 (2000) ("a more specific statute generally controls over a general statute on the same subject").
[75] EO 20-04, ¶ 2 ("Consistent with the minimum GHG reduction goals set forth in ORS 468A.205(1)(c) . . .").
[76] ORS 468A.205(3).
[77] EO 20-04, ¶ 13 ("This Executive Order will remain in effect unless and until it is superseded by statute or another Executive Order.")

Finally, in the absence of specific statutory language on RECs, parties ask the Commission to utilize its plenary rulemaking authority under ORS 756.060 or specific HB 2021 rulemaking authority in ORS 469A.435, to address the REC issue.[78] But in order to do so, the Commission first has to find a rationale to promulgate rules, and in this instance, that rationale is lacking.[79] Even assuming that these statutes *allow* for the Commission to adopt rules requiring RECs to be retired, it does not *require* that adoption, and this rule would conflict with HB 2021's specific language. If the Legislature intended for the Commission to adopt such a significant rule, it would have explicitly directed the Commission to do so, and not rested its direction on the implicit "breadth and of responsibility delegated to the agency."[80]

## V. THE COMMISSION HAS SIGNIFICANT EXPERIENCE IMPLEMENTING PUBLIC INTEREST STANDARDS, AND NO ADDITIONAL GUIDANCE IS NEEDED.

Several parties discuss how the public interest criterion for CEP acknowledgment should push the Commission to exert its legislative power and further define inexact terms, require additional factors in weighing the public interest, or impose requirements on utilities that are far outside of the Commission's authority to impose.[81]

The Joint Utilities reiterate that public interest directives are not unique to ORS 469A.420 and that the Commission has significant experience and precedent to draw from when evaluating CEPs without a broadly expanding either its authority or the statutory framework.[82] Further, consideration of the public interest is already embedded in the IRP and CEP guidelines and development.[83] And regardless whether the Commission accepts the arguments of parties regarding additional public interest factors or requirements that they can only be applied prospectively and not apply to currently filed CEPs.

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[78] GEI Opening Brief at 4-5, OSSIA Opening Brief at 3, NewSun LLC Opening Brief at 7.

[79] *Coffee v. Board of Geologist Examiners,* 348 Or. 494, 498, 235 P.3d 678 (2010) ("If an agency is required to adopt a rule through rulemaking proceedings, that requirement must be found through an analysis of the specific statutory scheme under which an agency operates and the nature of the rule that the agency wishes to adopt. . . In the absence of an explicit directive, the breadth and kind of responsibility delegated to the agency by a statutory term . . . will be one, but not a dispositive factor."), *quoting Trebesch v. Employment Division*, 300 Or. 264, 267, 710 P.2d 136 (1985).

[80] *Id.* Nor do parties address the various complicating factors that would result from such a requirement, factors that could bog compliance down for years. A non-exhaustive list: How would REC-less legacy hydropower be treated? How would utilities report energy from PURPA facilities if not acquiring a REC in the contract? How are emitting, RPS compliant resources to be treated if the REC includes GHG? How would banking, expiration dates, and unbundled RECs be treated? How would resources and their RECs used for RPS compliance be treated under a REC-required HB 2021 framework?

[81] Sierra Club Op. Br. at 5 ("the Commission should complete the legislation and further define inexact terms"); NWEC Op. Br. at 7 ("The Commission has discretion to address issues relating to emissions beyond DEQ's accounting construct."); CRITFC Op. Br. at 19 ("We encourage the OPUC and Oregon's regulated utilities to reduce their reliance on the federal hydro system as they move forward."; NewSun Op. Br. at 11 ("the Commission should clarify in its 'public interest' factors that the 'public interest' also includes non-ratepayers and . . . communities located near gas plants.").

[82] Joint Utilities Op. Br. at 5–6.

[83] See Joint Utilities Op. Br. at 6, fn. 22.

## VI. CONCLUSION

The Joint Utilities make one final general observation about HB 2021 compliance and the advocacy that has occurred in this docket. The Joint Utilities operate the top two REC-based voluntary renewable energy programs, by sales and customer number, in the country. Both utility's programs are Green-e Energy Certified. We are extremely proud of the multi-decade effort to get us to that place and work diligently to promote and efficiently operate those programs. That said, these customer voluntary REC-based programs, as valuable as they were and are to help speed the transition to a low- and no-GHG future, do not assist in HB 2021 compliance. Further, while a large percentage of our customers have the ability and willingness to enroll in such voluntary programs, an even larger percentage do not.

Some intervening and interested parties in this docket have argued that the REC-issue must be resolved in this proceeding in favor of retirement of RECs to protect a voluntary market.[84] The Joint Utilities disagree and believe that the purpose of this docket is to develop a framework for a cost-effective, speedy and equitable transition to a clean energy future. Effects of this transition on voluntary REC programs can be considered, but the Commission's decision in implementing a mandatory obligation on the utilities should not hinge on the question of avoiding consequences to these voluntary programs.

The undertaking that the utilities and their customers are engaged in to meet HB 2021's targets, is not for the faint of heart. It will require implementation of historic amounts of energy efficiency, demand response, renewable generation, energy storage and likely technologies that are not yet commercially available. These resources and programs – with clear, immediate and verifiable impacts on emissions reductions – are where our collective attention should be focused. There is not time for academic questions or concerns to impede this transition, or a place for even the best-regarded programs to slow this change. The legislature directed the Joint Utilities to create an increasingly equitable and clean future at a reasonable cost.[85] That is what we are doing every day.

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[84] GEI Opening Brief at 2 ("Of note, as of 2021, the US REC market was valued at 11.45 billion dollars"); US EPA, interested party comment, at 5 (failing to require use of RECs may result in "dozens of organizations and nearly 10 EPA Green Power Communities [] no longer qualify[ing] to meet EPA Green Power Partnership program requirements"); CRS Comment on Scoping Order at 12 ("We recommend that states design GHG regulations to support and enhance, rather than undercut, voluntary markets.").

[85] For example, the legislature: directed the Commission to consider the economic feasibility and the cost to customers in acknowledging CEPs; required the convening of the Community Benefits and Impacts Advisory Group to assess such factors as energy burden and the development and equitable implementation of the CEP; and by adopted a cost cap provision.

The Joint Utilities continue to appreciate the Commission and Commission Staff's diligent efforts with HB 2021-related issues, and respectfully request the Commission consider the Phase 1 arguments provided above.

Respectfully submitted August 21, 2023,

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