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.	NEWSUN ENERGY LLC'S REPLY BRIEF

I. Introduction

Pursuant to the schedule adopted by the Oregon Public Utility Commission ("Commission") in this docket, NewSun Energy LLC ("NewSun") submits this Reply Brief in response to the Phase 1 questions posed by the Commission in its June 5, 2023, Scoping Order.

II. Reply Analysis.

1. Regular showings of utility progress, documented in Commission orders subject to judicial review, are critical to ensuring meaningful compliance with the HB 2021 (the "Act").

As discussed in NewSun's Opening Brief, the Commission is vested with broad powers to achieve its legislative mandates. Even the Joint Utilities' Opening Brief acknowledges the Commission's "significant flexibility…to direct action by utilities that have failed to demonstrate continual progress and prompt action as required by Section 4(6)."[1] The Legislature has charged the Commission with "ensur[ing] that an electric company demonstrates continual progress"

[1] Opening Brief of Joint Utilities at 14.

toward the state's clean energy targets. ORS 469A.415(6). If the Commission is to give meaningful effect to this mandate, the Commission should require that utilities "demonstrate continual progress" in all relevant proceedings over which the Commission has jurisdiction – including, but perhaps not limited to, its acknowledgement (or non-acknowledgment) of clean energy plans ("CEPs") and integrated resource plans ("IRPs"), and approvals (or non-approvals) of requests for proposals ("RFPs") that carry out the utility's plans for resource procurement.

Further, Commission orders in which the Commission has an opportunity to evaluate utility progress toward the state's carbon-reduction goals – including acknowledgments of CEPs, IRPs, and RFPs – should be considered "final orders" under the Administrative Procedures Act ("APA").[2] Recently, the Commission joined with its regulated utilities in trying shield Commission regulation of utility resource procurement from judicial review. The Commission has endorsed the regulated utilities' position that final orders approving RFP designs, acknowledging RFP Final Shortlists, and acknowledging IRPs are not subject to judicial review under the APA.[3] According to the regulated utilities and the Commission, resource procurement actions—including those to be undertaken in compliance with HB 2021—would not be subject to judicial review unless and until the utility seeks to recover the costs of resources through a general case.

Presumably, the Commission intends to take the same position with respect to CEP acknowledgment. This means that the regulated utilities will have: (1) developed a 20-year plan to meet its emissions targets; (2) identified key near-term action items to make progress toward

[2] ORS Chapter 183.

[3] Respondent Oregon Public Utility Commission's Answering Brief at 21, *NewSun Energy LLC v. Oregon Public Utility Commission*, Oregon Court of Appeals No. A178808 (June 1, 2023); Respondent Oregon Public Utility Commission's Joinder in Intervenor PacifiCorp's Motion to Dismiss at 1, Deschutes County Circuit Court No. 22CV21264 (Aug 12, 2022) (joining PacifiCorp's argument that an RFP acknowledgment is not a final order); Respondent's Motion to Dismiss at 8, *NewSun Energy LLC v. Oregon Public Utility Commission*, Deschutes County Circuit Court Case No. 22CV24304 (Nov 11, 2022); Respondent's Motion to Dismiss at 7, Deschutes County Circuit Court No. 22CV37061 (Feb 2, 2023).

that goal; (3) had that plan and those action items acknowledged by the Commission; (4) designed an RFP to solicit resources to meet those near-term action items; (5) had its RFP design approved; (6) solicited and scored bids; (7) developed a shortlist; (8) sought Commission acknowledgment of the shortlist; (9) had that final shortlist acknowledged; (10) negotiated and executed contracts; and (11) constructed and brought projects online without the Commission ever having entered a single "final order" subject to judicial review. This divests the public and interested parties from the ability to challenge the electric utility's progress towards meeting the Act's clean-energy targets until it is too late.[4] Taken to its logical extent, the regulated utilities' and the Commission's position is that if the utilities choose not to comply with HB 2021 at all, and therefore never seek to recover the costs of eligible resource in their rates, then compliance with HB 2021 would *never* be subject to judicial review.

Continual progress requires more. First, the Commission "*shall ensure* that an electric company *demonstrates* continual progress." ORS 469A.415(6) (emphasis added). To "ensure" means to make certain that something shall occur, and to "demonstrate" means to clearly show the existence or truth of something by giving proof or evidence. Therefore, the Commission must make certain that continual progress is occurring by looking at proof or evidence. Second, the Commission shall also ensure that the regulated utility "is taking actions *as soon as practical* that facilitate the rapid reduction of greenhouse gas emissions." ORS 469A.415(6) (emphasis added). Waiting until the order at the end of a general rate case would simply be too late to make certain that actions were taken as soon as they could have been.

Further, the outcome of a general rate case concerns only what costs may be recovered in rates. The Commission may choose to disallow certain costs, for example, but it cannot in the context of a general rate case require the regulated utility to take action to retroactively modify its

[4] In that same proceeding, Portland General Electric has argued that NewSun's challenge is moot since PGE has already entered into contracts (largely with itself) for resource acquisition. NewSun is actively contesting PGE's position, as it would foreclose any opportunity to ensure the Commission and the utilities they regulate are complying with the law.

resource mix in order to comply with HB 2021. Likewise, judicial review of the Commission's rate-case order can test only whether the Commission acted appropriately in allowing or disallowing certain costs. It cannot test whether the Commission previously complied—in prior dockets and through prior final orders—with its obligations to implement and enforce HB 2021. Therefore, delaying judicial review of HB 2021 until the end of a future rate case means there will never be judicial review of HB 2021. It is easy to see why the regulated utilities are advocating for this outcome. But continual progress requires enforceability *before* projects are constructed and the utility seeks to add those costs into rate base.

Further, the importance of the Commission's oversight of its regulated utilities has taken on added importance in light of the recent increase in both the severity and occurrence of wildfires. A jury recently found PacifiCorp grossly negligent and reckless for its role in contributing to for four Labor Day 2020 wildfires.[5] These recent events instruct that neither the Commission nor Oregon Courts should defer to regulated utilities to protect the public interest, particularly in light of their profit motive, and the Commission's approval of a utility's IRP, CEP, or RFP must be reviewable to ensure that its actions present the least financial—and physical—risk to the public.

2. The Dormant Commerce Clause does not preclude the Commission from giving substantial weight to the Policy Statements in implementing the Act.

The Joint Utilities' Opening Brief spends considerable effort arguing against the notion of an "in-state preference" for siting renewable generation projects. First and foremost, the Commission should turn a critical eye on exactly why the Joint Utilities are so staunchly opposed to building eligible renewable resources in Oregon. The Joint Utilities' Opening Brief makes it crystal clear that they intend to build renewable generation outside of Oregon while simultaneously claiming the carbon-reduction benefits inside of Oregon. Resources providing no actual power to

[5] Sickinger, Ted, *Pacificorp Verdict Finds Utility Negligent in Four Labor Day Wildfires; Jury Awards Victims Nearly $72 Million*, THE OREGONIAN (June 13, 2023), https://www.oregonlive.com/business/2023/06/pacificorp-found-negligent-in-four-labor-day-wildfires-jury-awards-nearly-72-million.html.

ratepayers in Oregon, and providing no actual benefits to the public in Oregon, will nonetheless be charged to ratepayers in Oregon and touted as meeting the utility's obligations under HB 2021. Meanwhile, the resource mix used to serve ratepayers in Oregon remains—at best—exactly the same after HB 2021 as it was before HB 2021. This outcome would render HB 2021 illusory. Unless renewable energy generated outside of Oregon is actually tagged for delivery to ratepayers in Oregon, the Commission must reject the utilities' preferred strategy for "compliance" with HB 2021.

Aside from revealing their true intention to frustrate HB 2021, the Joint Utilities' Opening Brief overlooks the multifaceted nature of ORS 469A.405(2):

> [It is the policy of the State of Oregon…] [t]hat electricity generated in a manner that produces zero greenhouse gas emissions also be generated, to the maximum extent practicable, in a manner that provides additional direct benefits to communities in this state in the forms of creating and sustaining meaningful **living wage jobs**, promoting **workforce equity** and **increasing energy security** and **resiliency**.

The statute expresses a desire for "benefits to communities in this state." It should come as no surprise that the Oregon legislature would want its laws to benefit Oregon communities. Indeed, it could be argued that *every* law passed by the Oregon legislature is intended to benefit Oregon communities. Those benefits can manifest themselves in many ways. The general notion that the Act should be interpreted and implemented in a way that benefits Oregon communities does not violate the dormant aspect of the U.S. Constitution's Commerce Clause.

The dormant Commerce Clause "prohibits the enforcement of state laws 'driven by…economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'"[6] In evaluating whether a state law violates the dormant Commerce Clause, the courts look first to whether the law facially discriminates against interstate commerce. If so, the law "will survive only if it advances a legitimate local purpose that

[6] *Nat. Pork Producers Council v. Ross*, 143 S.Ct. 1142, 1153 (2023) (plurality opinion).

cannot be adequately served by reasonable nondiscriminatory alternatives."[7] If the law is not facially discriminatory, "but regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[8]

The mere fact that a law benefits products generated or sold within a geographic area does not render it facially discriminatory or *per se* violative of the dormant Commerce Clause. For example, in *Rocky Mountain Farmers Union v. Corey*, the U.S. Court of Appeals for the Ninth Circuit upheld California's Low Carbon Fuel Standards ("LCFS").[9] The California Air Resources Board established the LCFS to reduce greenhouse gas ("GHG") emissions from the transportation sector. In addition to aiming to reduce in-state consumption emissions (tailpipe standards), the LCFS also captured the carbon intensity of transportation fuel production by applying a lifecycle analysis of fuel production, measuring the carbon intensity of the fuel feedstock, refinement processes, transportation to California, and other factors. The plaintiffs alleged that the law's provisions relating to ethanol and crude oil discriminated against out-of-state commerce and regulated extraterritorial activity in violation of the dormant Commerce Clause. The Ninth Circuit found the LCFS was not discriminatory because the LCFS was based not on a fuel's origin but on its carbon intensity:

> Under dormant Commerce Clause precedent, **if an out-of-state ethanol pathway does impose higher costs on California by virtue of its grater GHG emissions, there is a nondiscriminatory reason for its higher carbon intensity value**... [I]f producers of out-of-state ethanol actually cause more GHG emissions for each unit produced, because they use dirtier electricity or less efficient plants, CARB can base its regulatory treatment on these emissions. **If California is to successfully promote low carbon-intensity fuels, countering a trend towards increased GHG output and rising world temperatures, it cannot ignore the real factors behind GHG emissions**.[10]

[7] *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008).
[8] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).
[9] *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013)
[10] 730 F.3d at 1089-90 (emphasis added).

Similarly, in *Allco Finance Ltd. v. Klee*, the U.S. Court of Appeals for the Second Circuit upheld a Connecticut law that restricted the use of renewable energy certificates ("RECs") to those generated within the New England ISO and contiguous regions in order to meet the state's renewable portfolio standards ("RPS").[11] Allco challenged the law, as RECs produced from its Georgia facility did not qualify for the RPS. The Second Circuit determined that the law was facially neutral, since (1) RECs produced in Georgia and RECs produced in ISO-NE are different products; and (2) Connecticut consumer's need for a more diversified and renewable energy supply, and the regional grid through which that energy is supplied, is independent of any effect attributable to the state's RPS program.[12] In balancing the relative benefits and burdens of the law, the court recognized the state's "legitimate interest in promoting increased production of renewable power generation in the region, thereby protecting its citizens' health, safety, and reliably access to power" and upheld the RPS program.[13]

Here, the Act is facially neutral. Contrary to the Joint Utilities' suggestion, the Act does not outright prohibit out-of-state generation. Nor does it impose any tax, cost, penalty, or other financial burden on out-of-state generation. Likewise, the Act does not purport to create any physical, financial, or other advantage for in-state generation. It merely states the desire to achieve zero-carbon emissions for electricity used to serve ratepayers *in Oregon* in a manner that – "to the maximum extent practicable" – benefits Oregon communities. Such benefits may include the creation of living-wage jobs, workforce equity, energy security, and resiliency. Certainly one cannot read the phrase "to the maximum extent practicable" to mandate an unlawful practice. The Act does not bar utilities from using power generated from out-of-state; it merely identifies the

[11] *Allco Finance Ltd. v. Klee*, 861 F.3d 82 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 926 (2018). *See also Direct Energy Services, LLC v. PURA*, 347 Conn. 101 (2023) (Connecticut law prohibiting voluntary renewable energy program from using renewable energy credits (RECs) from outside specified geographic area held facially neutral and not violative of *Pike* balancing test).
[12] 861 F.3d 105-06.
[13] *Id.* at 106.

state's legitimate interests that the Commission and its regulated utilities must strive to achieve in meeting the zero-carbon mandate. Similar to the laws in *Rocky Mountain Farmers* and *Allco*, the Act seeks a legitimate local public interest – the rapid reduction of greenhouse gases in a way that benefits Oregon communities with a more equitable, resilient, and secure energy supply. The statute does not impose a burden – and certainly not a clearly excessive burden – on interstate commerce. As a facially neutral law, therefore, the correct dormant Commerce Clause analysis of HB 2021 would apply the deferential *Pike* balancing test.

While NewSun believes that a preference for clean-energy generation that enhances resiliency, energy security, and workforce equity would not be *per se* violative of the dormant Commerce Clause, there are numerous ways the Policy Statements can be furthered in the implementation of the Act. As the Commission noted in its Scoping Order[14], the Policy Statements are furthered through several other provisions of the Act, such as the requirement that CEPs "examine the costs and opportunities of offsetting energy generated from fossil fuels with community-based renewable energy.[15] This should not be the stopping point. There are many ways the Commission could give weight to this legislative policy without establishing an outright requirement for in-state renewable generation. For example, and without limitation[16]:

[14] Order No. 23-194 at 5.

[15] "Community-based renewable energy" means one or more renewable energy systems that interconnect to utility distribution or transmission assets and may be combined with microgrids, storage systems or demand response measures, or energy-related infrastructure that promotes climate resiliency or other such measures, and that: (a) Provide a direct benefit to a particular community through a community-benefits agreement or direct ownership by a local government, nonprofit community organization or federally recognized Indian tribe; or (b) Result in increased resiliency or community stability, local jobs, economic development or direct energy cost savings to families and small businesses. ORS 469A.400(2).

[16] NewSun offers this list solely as an example, and not as a comprehensive list of ways the Commission could implement HB 2021's Policy Statements.

- The Commission could (and should) require the utilities to demonstrate—through actual tagging records—that any energy from out-of-state resources that is claimed to reduce carbon emissions *in Oregon* is actually being delivered to consumers *in Oregon*;
- The Commission could (and should) require the utilities to demonstrate that the environmental attributes of any resources paid for by Oregon ratepayers are being delivered to Oregon ratepayers;
- The Commission could (and should), as part of its regulation of the resource procurement process, expressly consider the financial and environmental costs associated with the construction and use of transmission facilities needed to import energy from out-of-state generation resources to ratepayers in Oregon;
- The Commission could (and should) require utilities to demonstrate in their CEPs, RFPs, and IRPs how their plans and procurements affect the power infrastructure located *in Oregon* so as to increase energy security and resiliency for Oregon consumers and Oregon communities by, for example, mitigating transmission constraints and reducing wildfire risks;
- The Commission could (and should) require utility procurements to demonstrate how projects promote living-wage jobs and workforce equity for Oregon communities;
- The Commission could (and should) require utilities to demonstrate how their own employment practices promote living wage jobs and workforce equity;
- At a minimum, the Commission could (and should) require each of the regulated utilities to submit an annual report to the Commission explaining in reasonable detail what steps the utility is undertaking to meet the express policy goals stated in HB 2021.

NewSun is not alone in its belief that the Commission should implement the Act consistent with, and with an aim toward meaningfully achieving, the Policy Statements expressed in ORS 469A.405. NewSun supports both the comments that recommend that the Commission implement these policy statements through its flexibility in interpreting the public interest under the Act's "public interest" CEP acknowledgement criteria,[17] as well as the other commenters that go farther to recommend that the Commission also implement this in its other implementing activities, like in RFP dockets.[18] The Commission should solicit additional comments from stakeholders regarding the ways in which the Commission should implement the Act and its Policy Statements in a way that is consequential and designed to achieve the legislature's goals.

3. The Commission should find that the Act fosters a load-based approach to emissions accounting, which necessarily requires the retirement of RECs.

It should be clear by now that the regulated utilities intend to gut HB 2021 by building distant, out-of-state renewable resources that deliver little or no actual renewable energy or environmental attributes to Oregon, and that confer no benefits on Oregon communities. This is a lose-lose proposition. Oregon ratepayers will be socked with all of the costs, and yet receive none of the benefits. In fact, it quite possible that the energy physically delivered to Oregon ratepayers will be dirtier after HB 2021 "compliance" than it was before.

NewSun therefore supports and concurs with Center for Resource Solutions' excellent Opening Brief, including specifically its conclusion that "the only way for HB 2021 to deliver clean power to Oregon customers is for the Commission to interpret it as a load-based policy and require REC retirement for renewable generation."[19] NewSun further encourages the Commission

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[17] For example, the Opening Briefs of Climate Solutions, the Columbia River Inter-Tribal Fish Commission, the Oregon Solar + Storage Industries Association, Pine Gate Renewables, LLC, Renewable Northwest, and the Joint Opening Brief of Sierra Club, Rogue Climate, Columbia Riverkeeper, and Coalition of Communities of Color.
[18] For example, the Opening Briefs of the Oregon Solar + Storage Industries Association, and Pine Gate Renewables, LLC.
[19] Opening Brief of Center for Resource Solutions at 12.

to require that any RECs used for compliance be generated contemporaneously with the associated power delivered to serve the utility's Oregon load, such that RECs cannot be "banked" for future compliance purposes. The Commission's objective – and indeed, its legislative mandate – should be to give meaningful effect to the Act. The only way it can ensure timely and substantive compliance with the Act's stated objective – to "facilitate rapid reduction of greenhouse gas emissions at reasonable costs to retail electricity consumers"[20] – is to ensure that utilities are actually bringing compliant power to Oregon load without double-counting the attributes of that power. The Joint Utilities have already indicated that they are not going to do this on their own initiative. This is not going to happen unless the Commission acts now to make it happen.

III. Conclusion

For the foregoing reasons, NewSun respectfully requests that the Commission implement the Act in a manner that is meaningful, consistent with the statutory policy, and aimed toward successfully accomplishing the Legislature's emission-reduction mandates.

Dated this 21st day of August, 2023.

Respectfully submitted,

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[20] ORS 469A.415(6).

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