

**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.

OPENING BRIEF OF THE
GREEN ENERGY INSTITUTE AT
LEWIS & CLARK LAW SCHOOL

I.	Introduction.....	2
II.	Argument	3
A.	HB 2021 is a load-based program; therefore, the Commission can and should require the retirement of RECs.....	4
1.	The Oregon Public Utility Commission has the Authority and Obligation to Require the Retirement of RECs	4
2.	Distinguishing a Load-based Program from a Generation-based Program.....	5
3.	Legal Basis of RECs and Environmental Marketing Claims	6
4.	The Text and Context of HB 2021 Support the Retirement of RECs	9
B.	A Generation-Based Program is Not a Silver Bullet to Address Double Counting Risks and, In Fact, Will Impose New and Confusing Requirements	15
C.	A Generation-Based Program Poses Risk to Utilities and Ratepayers	18
1.	The FTC’s Pre-enforcement Letter related to RECs and Double Counting Offers a Warning.....	18
2.	The FTC’s Green Guides will require proper disclosure under a generation-based program.....	19
3.	Oregon’s Unfair Trade Practices Act and Washington’s Consumer Protection Laws Pose Risks to Utilities and their Customers.....	20
D.	A Load-Based Program Does Not Inherently Conflict with Involvement in a Day-Ahead Market and Wholesale Electricity Markets	21
III.	Conclusion	25

I. Introduction

The Oregon Public Utility Commission is at a critical crossroads in HB 2021 implementation, a law intended to mitigate the impacts of the climate crisis by delivering clean electricity derived from non-emitting resources to Oregonians. Only one route can be taken. And the choice cannot be postponed.

As we have previously offered, treating HB 2021 as a load-based program presents the most direct route to satisfying HB 2021 targets. This route fulfills the promises made by the Oregon legislature, supports renewable energy generation that Oregon utilities can claim they are delivering and their customers are using, and avoids unnecessary legal and financial risks. Finally, a load-based program offers the strongest climate policy to ground negotiations in the development of a Western wholesale energy market and regional transmission operating system.

In the other direction, there is a narrow path with bumps and twists that sweeps aside key provisions of HB 2021 and undermines the integrity and well-understood legal basis of RECs. This path poses unnecessary risks to ratepayers under federal and state consumer protection laws and contorts the law's provisions in a way that is untenable in the long run.

Under either scenario, the Commission must address RECs from renewable energy that is generated to comply with HB 2021.

As described more fully below, we offer the following considerations:

- The Commission should use its authority to require the retirement of RECs because the text and context of HB 2021 demonstrate that it is a load-based program.
- Concluding that HB 2021 is a generation-based program does not clear up the double counting problem and, in fact, creates new problems to solve, including more heavily regulating utility marketing statements.
- To the extent the likelihood of a market is relevant to this discussion, a load-based accounting method, which requires the retirement of RECs, is consistent with neighboring state climate laws. and is not inconsistent with wholesale electricity markets.

The Commission must act now on this matter.¹ If HB 2021 is a generation-based program, clarity will be necessary to determine which renewable energy facilities contribute to Oregon's RPS and which facilities contribute to HB 2021. A lack of clarity could result in legal and financial risks to Oregon utilities and ratepayers that the Commission can avoid by choosing to accept the authority the legislature has given it. Of note, as of 2021, the U.S. REC market was valued at 11.45 billion dollars and is expected to double in value by 2030.²

In response to the specific questions posed by the Commission, we offer the following:

¹ For example, a review of Portland General Electric's (PGE) CEP reveals there are roughly two years until HB 2021 mandates for non-emitting generation exceed Oregon's Renewable Portfolio Standards (RPS) requirements. PGE, Clean Energy Plan and Integrated Resource Plan 293-94, Figure 105. RPS compliance of Preferred Portfolio (2023), <https://edocs.puc.state.or.us/efdocs/HAA/lc80haa8431.pdf>.

² Adam Wilson & Tony Lenoir, *US renewable energy credit market size to double to \$26 billion by 2030*, S&P Global Market Intelligence (Dec. 16, 2022), <https://www.spglobal.com/marketintelligence/en/news-insights/research/us-renewable-energy-credit-market-size-to-double-to-26-billion-by-2030>.

Phase 1(a)(1)	Can and should the Commission require retirement of RECs to demonstrate compliance with HB 2021?	Yes, see Section II. RECs are not necessarily required for <i>compliance</i> with HB 2021, but in order to accept utility GHG emission reporting to DEQ of zero-emissions from solar, wind, and other REC-generating renewable power, the associated REC must be retired.
	Does the answer depend on how the Oregon Department of Environmental Quality (DEQ) interprets and implements ORS 468A.280?	No, see Section II.A. It is the Commission’s responsibility to use its authority to protect electricity customers and to ensure that HB 2021 is implemented in a manner that is consistent with the policy and terms of the law and that Clean Energy Plans are in the public interest.
	If the Commission does not require retirement of RECs, can and should it otherwise restrict their use by utilities subject to HB 2021?	Yes, see Sections II.B and C. If associated RECs are not retired, the Commission must address the result of associated REC sales, including (1) the potential for unsubstantiated environmental marketing claims by utilities in violation of federal and state laws and (2) the massive conflict between the emissions reports from DEQ being used to reflect zero-emission generation, on the one hand, and documentation available to the Commission demonstrating REC sales, on the other. An order concluding HB 2021 is generation-based must include a statement that the utilities may not make any renewable energy delivery claims to customers.
Phase 1(b)(2)	Invite initial identification of programs and issue areas we need to revisit assuming that we adhere to our preliminary inclination on Issue I(a)(1).	See Sections II.B and C. Other issue areas might become apparent as this docket proceeds.

II. Argument

When the Oregon legislature enacted HB 2021, proclaimed the “100% Clean Energy for All” bill by advocates, it promised Oregon retail electricity customers clean electricity generated from non-emitting resources.³ In order to deliver on the promises of the law, the Commission can and should require the retirement of RECs generated from renewable resources that are used to meet HB 2021 compliance standards. HB 2021’s text and context support a finding that RECs must be retired when the associated non-emitting source is used for HB 2021 compliance.

³ Oregon Clean Energy Opportunity Campaign, <https://cleanenergyoregon.org> (last visited July 3, 2023) (describing the bill as providing “100% Clean Energy for All”).

Hereafter, RECs associated with the generation attributed to a utility under HB 2021 and delivered to retail electricity consumers are referred to as “associated RECs.”

A. HB 2021 is a load-based program; therefore, the Commission can and should require the retirement of RECs.

Statutory interpretation is a three-step process. The first task is to “examin[e] [the] text and context” of the statute, such that it receives the “primary weight in [its] analysis.”⁴ “[T]here is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes.”⁵ Further, “[c]ontext includes statements of statutory policy.”⁶

Second, regardless of whether any ambiguity remains, the Commission may “consult” pertinent legislative history provided by “a party” if that legislative history “appears useful to the analysis.”⁷ Third, “[i]f the legislature’s intent remains unclear after examining the text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty.”⁸ Finally, in its statutory interpretation analysis the Commission is “obligated to take a statute as [it] find[s] it and give effect to all of it, if possible.”⁹

1. The Oregon Public Utility Commission has the Authority and Obligation to Require the Retirement of RECs

Under the Commission’s organic statute, the Oregon legislature has granted the Commission the authority to require the retirement of RECs. The Commission “shall” use its “powers” to “protect . . . customers, and the public generally” from “unreasonable . . . practices.”¹⁰ As discussed in Part II.C, allowing Oregon’s utilities to sell associated RECs poses a risk of double counting the non-power attributes of renewable energy and, thus, violations of federal and state consumer protection laws. To avoid that risk, the Commission can and should use its power to require the retirement of associated RECs.

Additionally, under ORS 469A.420, the Oregon legislature tasked the Commission with evaluating compliance with the clean energy targets by comparing the DEQ-forecasted emissions reductions with the utilities’ expected GHG emissions reductions in their CEPs.¹¹ However, emissions verification is not the sole measure of compliance with the law. The Commission must also evaluate whether the CEPs are consistent with the public interest. The legislature explicitly identified the public interest factors to include “reduction of greenhouse gas emissions” and “any related environmental or health benefits,” consumer costs and risks, and, importantly, “any other

⁴ State v. Gains, 346 Or 160, 206 P3d 1042, 171-72 (2009).

⁵ Adelsperger v. Elkside Dev’t, 371 Or 61, 529 P3d 230, 70, 236 (2023) (internal quotation marks omitted).

⁶ Providence Health System Oregon v. Walker, 252 Or App 489, 289 P3d 256 (2012); *see also* Fenimore v. Blachly-Lane County C.E.A., 297 Or App 47, 441 P3d 699 57, 707 (2019) (“Statements of statutory policy are considered useful context for interpreting a statute.”).

⁷ *Id.* at 172.

⁸ *Id.*

⁹ Wyers v. American Medical Response Northwest, 360 Or 2011, 377 P3d 570, 221, 576 (2016); *see also* Force v. Dept. of Rev., 350 Or. 179, 190, 252 P.3d 306 (2011) (“Statutory provisions, however, must be construed, if possible, in a manner that will give effect to all of them.”).

¹⁰ OR. REV. STAT. § 756.040.

¹¹ OR. REV. STAT. § 469A.420(2).

relevant factors as determined by the commission.”¹² The legislature provided the Commission with markers as to what is relevant to the public interest under HB 2021 and conferred ample authority and an invitation to act in ways that protect Oregon ratepayers, ensure climate policy symmetry, and avoid double counting renewable energy generation.

The Commission’s authority to retire RECs under HB 2021 is also guided by executive action. Executive Order 20-04, which directs the Commission to “exercise any and all authority and discretion vested in them by law to help facilitate Oregon’s achievement of [its greenhouse gas] emission reduction goals,” remains applicable and is now supported by Oregon law.¹³

Relevant to the Commissioner’s choice of path in this proceeding, the Commission must now report to the Oregon Climate Action Commission (formerly the Oregon Global Warming Commission) about its efforts to “make progress toward the greenhouse gas emission reduction goals” in state law.¹⁴ Only a load-based program offers the Commission a robust and honest reporting method. Under a load-based program, the Commission can accurately state that Oregon’s utilities have reduced emissions, and those emissions have not been double counted and resulted in an inaccurate over-representation of the amount of renewable energy on the power grid and under-representation of emissions on the grid.

2. *Distinguishing a Load-based Program from a Generation-based Program*

As discussed during the UM 2273 Commission Workshop on RECs on June 29, 2023,¹⁵ a load-based program (consumption-based) measures the emissions associated with electricity generation sold to or purchased by retail electricity consumers. Under a load-based program, the regulator allocates generation to the load, i.e., customers, and the program accounts for contractual and market transactions of the generation and the attributes, including environmental attributes. Compliance can either be rate-based (i.e., an emissions factor) or mass-based (i.e., emissions). When using load-based accounting, regulators must use a tracking mechanism for renewable resources, most commonly a REC, to account for the environmental attributes of renewable energy.¹⁶

In contrast, a generation-based program measures the emissions associated with electricity generated in a place, such as a geographic area, or at certain sources, such as those owned or controlled by regulated entities, used for a certain purpose, and/or otherwise defined. This group of sources does not necessarily comprise the generation attributes that are contractually allocated to load or sold and purchased by customers. A generation-based accounting program focuses on the emissions at certain generation sources rather than the retail delivery or use of generation and

¹² *Id.*

¹³ EO 20-04 at paragraph 3(A) (emphasis added). Although EO 20-04 was issued prior to the passage of HB 2021, the Commission continues to have an obligation to “exercise any and all authority and discretion” to meet the EO’s GHG emissions reduction targets and, relatedly, ensure that its decisions do not muddy the waters in sorting out how much progress has actually been made in meeting those targets.

¹⁴ Designated State Agency Programs for Energy Efficiency in Buildings, Enrolled HB 3409 (HB 3409-C), Section 2(2)(a) and (b), <https://olis.oregonlegislature.gov/liz/2023R1/Downloads/MeasureDocument/HB3409/Enrolled>.

¹⁵ Oregon Public Utility Commission & Dep’t of Env’t Quality, *UM 2273 Commission Workshop on Renewable Energy Certificates* (June 29, 2024), <https://edocs.puc.state.or.us/efdocs/HAH/um2273hah101953.pdf> [hereinafter OPUC, Workshop on RECs].

¹⁶ Center for Resource Solutions, *Guide to Electricity Sector Greenhouse Gas Emissions Totals 3* (Nov. 2022), <https://resource-solutions.org/document/110322/>.

associated emissions. No tracking mechanism is needed to allocate generation attributes to load for a generation-based program.¹⁷

3. *Legal Basis of RECs and Environmental Marketing Claims*

HB 2021 was neither crafted nor enacted in a vacuum. The legal basis for RECs is well established.¹⁸ Although there are distinctions from state to state in the definition and use of RECs, there is broad uniformity in what a REC represents.¹⁹ Likewise, there are long-standing legal frameworks underpinning environmental marketing claims. The Commission must recognize this landscape when determining whether HB 2021 is a load-based or generation-based program.

Generally speaking, RECs are “a market-based instrument that represents the property rights to the environmental, social, and other non-power attributes of renewable electricity generation,” including the zero-emissions attributes.²⁰ In Oregon, a REC is “a unique representation of the environmental, economic, and social benefits associated with generating qualifying electricity, which includes energy from wind, solar, and some hydroelectric power.”²¹ In the Western Interconnection, which includes Oregon, the Western Renewable Energy Generation Information System (WREGIS) issues a REC when 1 MWh of electricity is generated and delivered to the power grid from renewable energy sources.²² WREGIS manages REC transfers and retirement and coordinates with other REC registries to prevent double counting between registries.

Double counting occurs when two entities claim ownership or use of the same non-power attributes one REC represents.²³ Double counting can occur in various ways. For example, double counting occurs when two parties make claims—public statements or representations—directly or by implication to the same 1 MWh of renewable energy or any of the environmental attributes represented by the REC.²⁴ Only a REC owner can lay claim to the renewable energy and its environmental attributes. Proper regulatory guidance for environmental marketing claims has been integral to maintaining REC integrity. The Commission should consider this guidance to fully understand the difference between the environmental marketing claims that Oregon’s utilities can make about renewable energy generation under a load-based and a generation-based program.

For nearly a quarter century, consumer protection experts have issued consistent guidance on renewable energy marketing claims. In 1999, the National Association of Attorneys General

¹⁷ *Id.* at 2.

¹⁸ See generally Center for Resource Solutions, *The Legal Basis for Renewable Energy Certificates* (2023), <https://resource-solutions.org/wp-content/uploads/2015/07/The-Legal-Basis-for-RECs.pdf>.

¹⁹ *Id.* at 12 (“RECs are heavily used as the primary means of tracking the environmental attributes of grid-connected renewable electricity generation.”).

²⁰ *Renewable Energy Certificates (RECs)*, EPA.gov (Feb. 5, 2023), <https://www.epa.gov/green-power-markets/renewable-energy-certificates-recs>; see also Center for Resource Solutions, *supra* note 18 at 12.

²¹ OR. ADMIN. R. 330-160-0015(17).

²² WREGIS - FAQ, WREGIS 1, (2016), https://lpea.coop/sites/lpea/files/pdf/renewables/WREGIS_FAQ.pdf.

²³ *Double Counting*, EPA.gov (Feb. 5, 2023), <https://www.epa.gov/green-power-markets/double-counting>.

²⁴ *Green-e Energy*, Explanation of Green-e Energy Double-Claims Policy 2 (2014), <https://resource-solutions.org/wp-content/uploads/2015/07/Explanation-of-Green-e-Energy-Double-Claims-Policy.pdf>.

(“NAAG”) adopted the *Environmental Marketing Guidelines for Electricity*.²⁵ At the time, Oregon Attorney General Hardy Myers led the drafting of the Guidelines alongside Vermont’s Attorney General’s office.²⁶ These guidelines established standards for non-deceptive “green” advertising and paved the way for the “Renewable energy claims” provision in the Federal Trade Commission’s *Guides for the Use of Environmental Marketing Claims*, also known as the “Green Guides,” and codified in 16 CFR 260.15.

The NAAG’s Guidelines set forth general principles that provide sage advice to avoid misrepresentation of environmental benefits, such as claiming to deliver renewable energy to retail customers but, at the same time, selling the associated RECs to third parties. General principles to protect customers included avoiding deception, requiring substantiation, and providing clear and meaningful qualifications and disclosures, among others. Specifically, the NAAG’s Guidelines stated, “[a] claim is deceptive, and therefore unlawful if it contains an express or implied representation or omission of fact that is likely, or has a tendency, to mislead consumers.”²⁷ To determine whether a marketer implies a claim, the “overall advertisement,” including the “context of the overall advertisement, . . . including images,” must be reviewed. Moreover, “[a] claim that can be interpreted in a misleading way may be deceptive, even though other, non-misleading interpretations may be equally possible.”²⁸ Concerning substantiation, the Guidelines stated that “if the same electricity or its attributes are sold more than once to consumers, the claim is deceptive.” Under the qualifications and disclosures principle, the NAAG stated, among other directives, that “[a] claim that is otherwise deceptive cannot be rendered non-deceptive by a qualification that is inconsistent with the substance of the claim.”²⁹

In 2012, the FTC added renewable energy claims to the Green Guides.³⁰ The FTC established the Green Guides to prevent greenwashing.³¹ The Green Guides are administrative interpretations of Section 5 of the Federal Trade Commission Act³² and are enforced by the

²⁵ National Association of Attorneys General, *Environmental Marketing Guidelines for Electricity* (1999), https://www.epa.gov/sites/default/files/2018-05/documents/naag_0100.pdf [hereafter NAAG, Env’t Marketing Guidelines]

²⁶ National Association of Attorneys General, 12 Consumer Protection Report (March 2000).

²⁷ NAAG, Env’t Marketing Guidelines, *supra* note 25, at 3.

²⁸ *Id.* (“Deception can occur through the omission of information that is necessary to prevent an affirmative representation from being misleading. The test . . . [for] deceptive is . . .the overall impression.”).

²⁹ *Id.* at 4-8.

³⁰ 77 FR 62121, 62121-62132 (Oct. 11, 2012), <https://www.federalregister.gov/documents/2012/10/11/2012-24713/guides-for-the-use-of-environmental-marketing-claims>.

³¹ *See generally* Green Guides, Fed. Trade Comm’n., <https://www.ftc.gov/news-events/topics/truth-advertising/green-guides> (last visited July 24, 2023); *see also* Bruce Ratain, et. al, *What Cos. Can Expect from FTC’s Green Guides Updates*, Kirkland & Ellis (Jan. 12, 2023), <https://www.kirkland.com/publications/article/2023/01/what-cos-can-expect-from-ftcs-green-guides-updates>.

³² 15 USC §§ 41-58.

FTC.³³ The Green Guides have resulted in FTC enforcement letters,³⁴ enforcement actions,³⁵ and the adoption of similar state laws.³⁶

Section 5 of the Federal Trade Commission Act prohibits all persons from making “unfair or deceptive acts or practices in or affecting commerce.”³⁷ A “claim is deceptive if it likely misleads reasonable consumers.”³⁸ As such, the FTC based the Green Guides on “how consumers reasonably interpret claims, not on technical or scientific definitions.”³⁹ Under the Green Guides:

A representation, omission, or practice, is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers’ decisions. To determine if an advertisement is deceptive, marketers must identify all express and implied claims that the advertisement reasonably conveys. Marketers must ensure that all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis before they make the claims.⁴⁰

A load-based program offers the safest route for the Commission since the retirement of associated RECs demonstrates substantiation of “clean energy” claims under HB 2021. Supplier claims under a load-based program may include statements such as: “The emissions associated with this electricity are carbon-free,” “We deliver clean energy,” and other similar claims.⁴¹ Likewise, consumer claims include “We use clean energy” or “We buy 100% zero-emissions energy.”

In contrast, since there are no RECs involved in generation-based accounting, there are no claims or implications of delivering or using “clean energy” or environmental attributes (e.g., emissions profile) of “renewable energy.”⁴² In other words, statements heralding the “net-zero” or “clean energy” benefits of a generation-based program would be deceptive, unless properly disclosed. If

³³ Although the Federal Trade Commission Act does not include a citizen suit provision, the FTC may choose to “take action under the [FTC] Act if a marketer makes an environmental claim inconsistent with the [Green Guides].” The Green Guides: Statement of Basis and Purpose, Fed. Trade Comm’n., 24 <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguidesstatement.pdf> (last visited July 16, 2023) [hereinafter The Green Guides: Statement of Basis and Purpose].

³⁴ See, e.g., FTC Division of Enforcement Staff Letter to Green Mountain Power Corporation (Feb. 2, 2015), https://www.ftc.gov/system/files/documents/public_statements/624571/150205gmplletter.pdf.

³⁵ See FTC Uses Penalty Offense Authority to Seek Largest-Ever Civil Penalty for Bogus Bamboo Marketing from Kohl’s and Walmart, Fed. Trade Comm’n. (April 8, 2022), <https://www.ftc.gov/news-events/news/pressreleases/2022/04/ftc-uses-penalty-offense-authority-seek-largest-ever-civil-penalty-bogus-bamboo-marketing-kohls>.

³⁶ See, e.g., California Business and Professions Code § 17580.5 (Jan. 1, 2022) (“It is unlawful for a person to make an untruthful, deceptive, or misleading environmental marketing claim, whether explicit or implied. For the purposes of this section, ‘environmental marketing claim’ shall include any claim in the [Green Guides] published by the Federal Trade Commission.”).

³⁷ 15 USC § 45.

³⁸ The Green Guides: Statement of Basis and Purpose, *supra* note 33 at 24.

³⁹ *Id.* at 218.

⁴⁰ 16 CFR § 260.2.

⁴¹ Todd Jones & Noah Bucon, *Corporate and Voluntary Renewable Energy in State Greenhouse Gas Policy* 18, (2017), <https://resource-solutions.org/wp-content/uploads/2017/10/Corporate-and-Voluntary-RE-in-State-GHG-Policy.pdf>.

⁴² *Id.* at 10.

the Commission finds HB 2021 describes a generation-based program, Part II.C.1 addresses specific Green Guides provisions that become relevant under such a program.

4. *The Text and Context of HB 2021 Support the Retirement of RECs*

The text and context of HB 2021 support a load-based program and, therefore, the retirement of associated RECs. **Ten** separate statutory provisions, which are identified in detail below, along with any relevant context, provide insight into the load-based framework the Oregon legislature created to achieve the clean energy targets.

(1) ORS 469A.405 (HB 2021 Section 2)

The provision declares it is the policy of the State of Oregon “[t]hat retail electricity providers rely on non-emitting electricity in accordance with the clean energy targets set forth in section 3 of this 2021 Act and eliminate greenhouse gas emissions associated with *servicing Oregon retail electricity consumers* by 2040.” As statements of policy provide useful “context” in which to interpret HB 2021, the text of ORS 469A.405 is a guidepost signaling a load-based program.⁴³

Here, ORS 469A.405 aligns with a load-based program in that it regulates Oregon’s retail electricity providers, the commonly regulated entity under a load-based program. Importantly, the focus is *not* on *generators*, the commonly regulated entity under a generation-based program.⁴⁴

Further, the retail electricity providers are to deliver “non-emitting electricity” to retail consumers. Under the ORS 469A.400(7), “non-emitting electricity” is defined as “electricity ... that does not emit greenhouse gas into the atmosphere.” Based on this definition, “non-emitting electricity” constitutes an environmental attribute of renewable energy because it describes an environmental benefit, i.e., zero emissions. Under a load-based program, environmental attributes—embedded into the policy of HB 2021—must be accounted for with a tracking mechanism, such as a REC. Finally, the policy hits the critical part of a load-based program: that the electricity is *delivered to customers*. Here, and throughout the law, the legislature made clear the GHG reductions were those, and only those, associated with serving retail load.

(2) ORS 469A.400 (HB 2021 Section 1)

The provision defines “Baseline emissions level” for an electric company as “the average annual emissions of greenhouse gas for the years 2010, 2011, and 2012 associated with the *electricity sold to retail electricity consumers* as reported under ORS 468A.280.”⁴⁵ Here, HB 2021’s text supports a load-based program because the benchmark that determines compliance rests on the “electricity sold to retail electricity consumers,” a fundamental element of a load-based program. This text demonstrates that, at all turns, the legislature was focused on the emissions associated with Oregon’s *retail electricity consumers* and not emissions generally.

(3) ORS 469A.410 (HB 2021 Section 3)

⁴³ Providence Health System Oregon, *supra* note 6.

⁴⁴ See e.g., N.C. GEN. STAT. § 62-110.9 (2021), https://www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_62/GS_62-110.9.pdf.

⁴⁵ OR. REV. STAT. § 469A.400(emphasis added).

This establishes the “*clean energy targets*.”⁴⁶ The statute states that “[a] retail electricity provider shall reduce greenhouse gas emissions, measured for an electric company as greenhouse gas emissions reported under ORS 468A.280 by meeting the “*clean energy targets*.”⁴⁷ Here, the legislature chose to use a key phrase, “*clean energy*.” Under a plain meaning analysis, this phrase represents energy generated from renewable resources like wind and solar, as well as other non-emitting sources like hydroelectric power.

From a legal standpoint, renewable energy is only “*clean*” if the electricity is matched with a REC, whether bundled or unbundled, as the REC represents the environmental attributes, including its “*zero-emissions*” attribute of renewable energy.⁴⁸ As such, to the extent “*clean energy*” consists of renewable energy, the phrase must mean renewable energy *and* its corresponding REC; without the REC, renewable energy is “*null electricity*.”⁴⁹

Other state decarbonization laws recognize this relationship between RECs and clean energy targets. For example, in 2019, the State of Colorado adopted “*clean energy targets*,” which require a reduction of carbon dioxide emissions associated with electricity sales to certain utility customers by 80% by 2030 and 100% by 2050 or sooner.⁵⁰ Like Oregon’s HB 2021, Colorado’s law applies to utilities that serve a certain number of retail customers and requires utilities to prepare a “*clean energy plan*[].”⁵¹ Importantly, as a load-based program, the Colorado law directs utilities to retire associated RECs.⁵²

In contrast, if the Commission concludes HB 2021 is a generation-based program, the Commission would, in effect, *negate* the key “*clean energy*” provision of the law. Doing so would profoundly contravene Oregon’s principles of statutory interpretation. These impacts are discussed in detail in Part II.B.

(4) ORS 469A.410(2) (HB 2021 Section 3(2))

ORS 469A.410(2) states that “nothing in ORS 469A.400 to 469A.475 may be construed as establishing a standard that requires a retail electricity provider to track electricity to end-use retail customers.”⁵³ Under a plain language analysis, this provision addresses the fact that it is nearly impossible to track electrons on the power grid, regardless of generation type. From a physical standpoint, once a generating source dispatches its energy to the grid, that generation is

⁴⁶ OR. REV. STAT. § 469A.410(emphasis added).

⁴⁷ OR. REV. STAT. § 469A.410(1)(a)-(c).

⁴⁸ The Legal Basis for Renewable Energy Certificates, *supra* note, 18 at 4, 12.

⁴⁹ “Null power means any electricity produced by a renewable energy electric generating facility from which a [WREGIS] certificate has been unbundled and sold separately.” Deborah Kapiloff, Sydney Welter, & Vijay Satyal, *Greenhouse Gas Accounting Systems in Wholesale Regional Electricity Markets: Considerations for the Western Interconnection*, *Western Resource Advocates* 7, n.7 (January 2022), https://westernresourceadvocates.org/wp-content/uploads/2022/01/2022_0119_GHG_Accounting_-_Regional-Markets_f.pdf.

⁵⁰ COLO. REV. STAT. § 40-2-125.5(3)(a)(I)-(II), <https://leg.colorado.gov/sites/default/files/images/olls/crs2019-title-40.pdf> (see page 43).

⁵¹ COLO. REV. STAT. § 40-2-125.5(2)(c).

⁵² COLO. REV. STAT. § 40-2-125.5(3)(a)(III) (see page 43-44).

⁵³ OR. REV. STAT. § 469A.410(2).

indistinguishable from any other generation source.⁵⁴ The plain language of this provision conveys that Oregon’s utilities will not be responsible for such tracking.

Illustrating that HB 2021 was not drafted or negotiated in a vacuum, during the summer of 2020, while HB 2021 was undergoing early negotiations, the concept of tracking electrons on the grid was being discussed in the State of Washington. Specifically, a comment set from several energy and environmental non-profit organizations was interpreted as calling for physical source-to-sink tracking, i.e., tracking electrons of clean energy on the grid under the State of Washington’s Clean Energy Transition Act (CETA).⁵⁵ In response, Washington state utilities issued comments responding that such a call was inconsistent with the plain language of CETA.⁵⁶ Based on this discourse, and to avoid repeating the debate here, Oregon’s utilities had a reasonable basis for including a provision in HB 2021 prohibiting the physical tracking of electrons on the grid.

During the PUC REC workshop, PUC staff relied on this provision to mean “nothing in [the] statute should be construed as saying this is a load-based program ... if you are adopting a framing of a load-based program that is tracking emissions from generation to end use retail customer.”⁵⁷ Even if such an interpretation could somehow be gleaned from words that simply relieve the utilities of tracking electricity to the end user, the PUC should not read meaning into this provision that would be contrary to all of the other statutory provisions discussed here. In fact, not only would such a reading contravene multiple other provisions of the law, but the PUC’s suggested statutory interpretation would also conflict with “giv[ing] effect to all” of HB 2021.⁵⁸

(5) ORS 469A.415 (HB 2021 Section 4)

ORS 469A.415 states, “[a]n electric company shall develop a *clean* energy plan for meeting the *clean* energy targets ... concurrent with the development of each integrated resource plan”⁵⁹ that includes “annual goals . . . towards meeting the clean energy targets” for “acquisition of non-emitting generation resources”⁶⁰ and that “[r]esults in an affordable, reliable, and clean electric system.”⁶¹ Here, the Oregon legislature connected the “clean energy targets” with the “clean energy plan” and directed that new non-emitting resources be included in the integrated resource planning process. To give effect to the “clean energy plan” and the “clean electric system”

⁵⁴ *Renewable Energy Certificates*, *supra* note 20 (“[T]he physical electricity we receive through the utility grid says nothing of its origin or how it was generated.”).

⁵⁵ Joint submission on energy delivery from Sierra Club, Climate Solutions, Climate Justice, Washington Environmental Council, Earthjustice, Renewable Northwest, and NWECC, *Recommendations for the regulatory approach to interpreting “use” of renewable resources and nonemitting electric generation for Clean Energy Transformation Act compliance (UE-191023)* (Aug. 10, 2020), <https://deptofcommerce.app.box.com/s/fz1xlzcz20uacle200pvtoryavs6ci88/file/704762829481>.

⁵⁶ Joint utility letter on use recommendations and K&L Gates & Perkins Coie memo, *Recommendations for the regulatory approach to interpreting “use” of renewable resources and nonemitting electric generation for Clean Energy Transformation Act compliance (UE-191023)* (July 31, 2020), <https://deptofcommerce.app.box.com/s/fz1xlzcz20uacle200pvtoryavs6ci88/file/699205412366>

⁵⁷ OPUC, Workshop on RECs, *supra* note 15 at 0:28:06 min.

⁵⁸ *Wyers v. American Medical Response Northwest*, 360 Or 2011, 377 P3d 570, 221, 576 (2016); *see also Force v. Dept. of Rev.*, 350 Or. 179, 190, 252 P.3d 306 (2011) (“Statutory provisions, however, must be construed, if possible, in a manner that will give effect to all of them.”).

⁵⁹ OR. REV. STAT. § 469A.415(1).

⁶⁰ OR. REV. STAT. § 469A.415(4)(b).

⁶¹ OR. REV. STAT. § 469A.415(4)(f).

requires the utility to be able to substantiate these directives. To call the plans or the electric system “clean” while, at the same time, selling associated RECs would mislead the legislature as progress towards a “clean” electric system and deceive customers as to what type of electricity is being planned for and delivered on Oregon’s power grid.

RECs are the only widely accepted tool to substantiate a “clean” grid. The utilities can only achieve the legislative directive to meet “clean energy targets,” prepare “clean energy plans,” resulting in a “clean electric system” if HB 2021 is deemed a load-based program.

(6) ORS 469A.420 (Section 5(4)(a))

ORS 469A.420 provides that “[a] retail electricity provider shall report annual greenhouse gas emissions associated with the electricity *sold to retail electricity consumers* by the retail electricity provider to the [DEQ] in the manner set forth under ORS 468A.280, or rules adopted pursuant thereto.”⁶² In addition, ORS 469A.420 states that the Commission shall use the greenhouse gas emissions reported to the [DEQ] . . . to determine whether or not the retail electricity provider has met the clean energy targets.”⁶³ This statutory provision supports a load-based program because it establishes that DEQ, in its regulatory capacity, only regulates the GHG emissions *sold to retail consumers*. DEQ does not regulate GHG emissions from *generation sources*, which is the focus of a generation-based program.

DEQ underscored this load-based regulatory framework during the PUC REC workshop. At the workshop, DEQ staff provided information about DEQ’s GHG Reporting Program and how DEQ interprets and applies its rules. Throughout DEQ’s presentation, including in its answers to multiple clarification questions from the Commissioners, DEQ staff relayed that the amount of electricity *delivered to and used by* Oregon retail customers is the basis for the reports.⁶⁴

Specifically, DEQ stated that under its rules, DEQ calculates “the share of actual emissions that are attributed to Oregon’s load.”⁶⁵ DEQ’s own rules support this understanding. OAR 340-215-0120 states that “[e]lectricity suppliers . . . must report information and emissions related to the generation of *electricity delivered or distributed to end users in this state* during the previous year, *regardless of whether the electricity was generated in [Oregon] or imported.*”⁶⁶ Importantly, customer load drives DEQ’s reporting. Further, Oregon retail consumers should not be considered a “slice” of Oregon’s utility generation. Rather, DEQ tracks the generation allocated to the load, and the reporting accounts for contractual and market transactions of the generation.

Although DEQ does not track the *attributes* of non-emitting generation, it does track the energy generated by renewable energy sources that utilities deliver to retail customers.⁶⁷ For HB 2021’s compliance reporting to be accurate and to give effect to DEQ’s emissions factor of zero for

⁶² OR. REV. STAT. § 469A.420(4)(a).

⁶³ OR. REV. STAT. § 469A.420(4)(b).

⁶⁴ OPUC, Workshop on RECs, *supra* note 15 at 1:09:06 min.

⁶⁵ *Id.* at 1:09:06 min.

⁶⁶ OR. ADMIN. R. §340-215-0120.

⁶⁷ OPUC, Workshop on RECs, *supra* note 15, slide 20 (“Non-emitting sources: For non-emitting resources such as solar, wind, hydro, nuclear and closed-loop geothermal, the emission factor is zero, as no direct emissions are produced from those generation facilities.”).

renewable energy generation, such generation must be matched with associated RECs when one is produced.

The responsibility to require matching of non-emitting generation with any associated RECs falls on the Commission, not DEQ, because associated RECs derive from the Commission's various planning processes that result in the procurement and ownership of renewable resource generation and the associated purchase or issuance of RECs. Moreover, to prevent double counting of renewable energy attributes, the PUC must require the utilities to match RECs to any generation receiving a zero emissions factor from DEQ and ensure that those RECs are not made available to others.

For additional context, in its engagement in the rulemaking for Washington's Clean Energy Transformation Act (CETA), Pacific Power recognized the importance of regulations that "prohibit double counting of nonpower attributes associated with RECs."⁶⁸ In comments to proposed CETA rules, Pacific Power and other utilities serving Washington customers provided specific feedback and guidance on the proposed regulations to address double counting. In its comments, Pacific Power was solution-oriented, offering ideas on streamlining the process to prevent double counting.⁶⁹ The company's comments reveal that Pacific Power understands the potential for double counting, the resulting consequences of double counting, and how to address it. As such, any argument by Pacific Power that double counting is not a problem arising from the sale of associated RECs under HB 2021 or that double counting can't be addressed under HB 2021 is undermined by the company's recent and likely helpful engagement in CETA rulemaking.⁷⁰

(7) ORS 469A.425 (HB 2021 Section 6)

The provision establishes that the electric companies are to convene a Community Benefits and Impacts Advisory Group (CBIAG), which "must include representatives of environmental justice communities and low-income ratepayers."⁷¹ The CBIAG concept is the result of Environmental Justice advocacy groups and allies establishing that Oregon's clean energy transition requires a new way of thinking about the energy transition. In addition to advocating for 100% clean electricity, these groups sought living-wage workforce opportunities in the clean energy economy, resiliency initiatives, and community-based renewable energy systems that would provide local benefits.⁷² In creating the CBIAG, HB 2021 put Environmental Justice communities at the energy planning table.

⁶⁸ Avista, Pacific Power, Puget Sound Energy, Public Generating Pool, Docket No. UE-210183 – Relating to Electricity Markets and Compliance with the Clean Energy Transformation Act - Comments of Joint Utilities, State of Wash. Util. & Transp. Comm'n 1 (Dec. 6, 2021), <https://apiproxy.utc.wa.gov/cases/GetDocument?docID=642&year=2021&docketNumber=210183>.

⁶⁹ *Id.* at 4-5.

⁷⁰ See also Multi-year Compliance with Annual Surplus Accounting, Joint Utility Compromise Compliance Proposal 4 (Aug. 12, 2021), <https://www.commerce.wa.gov/wp-content/uploads/2021/08/Multi-year-Compliance-with-Annual-Surplus-Accounting-Presentation-8-11-21-Final-CLEAN1-Read-Only.pdf> (describing the joint utilities compromise proposal as putting "[s]trong double counting protections in place.").

⁷¹ OR. REV. STAT. § 469A.425(1); HB 2021 § 6(1) ("An electric company that files a clean energy plan under section 4 of this 2021 Act shall convene a Community Benefits and Impacts Advisory Group.").

⁷² See e.g., Rogue Climate, Testimony in support of HB 2021 (April 7, 2021), <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/24058>;

Only a load-based program can fulfill the promise made by the legislature to Environmental Justice groups and their allies. *Without the retirement of RECs, Environmental Justice communities receive a double punch to the gut.* They cannot claim the use of non-emitting resources to power their communities because the purchaser of the REC has that claim. And then, because the law actually regulates load and not generation sources, the utilities can and will continue to operate their thermal plants and export energy out of the state.⁷³ This means that Oregon’s front-line communities will continue 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.

(8) ORS 469A.430 (HB 2021 Section 7)

ORS 469A.430 states that “electricity shall have the emission attributes of the underlying generating resource.”⁷⁴ As noted above, DEQ’s GHG reporting program does not track renewable energy attributes—it *assumes* all electricity from renewable energy is zero emissions. Otherwise, DEQ would account for a specific emissions factor of renewable energy once its associated REC is sold. For renewable energy resources to *retain* a zero “emissions attribute[]” under this provision, the PUC must require REC retirement.

First, if the PUC permits utilities to sell associated RECs, the Commission will be endorsing the delivery of null electricity to Oregon customers while advancing the incorrect conclusion that the electricity is clean.⁷⁵ Delivery of null electricity will have ramifications for reporting and meeting the clean energy targets. We discuss this concern in Part II.B.

Second, the Commission will have access to documentation that shows that the DEQ reports are not a fair and accurate representation of GHG emission reductions from load-serving generation. Any documentation, filed in various dockets, that shows that associated RECs were sold to third parties—or were not contracted for in the power purchase agreement—is in direct conflict with the report from DEQ which assumes the zero-emissions attribute is retained. The Commission cannot reconcile this proof of double counting because it would conflict with the public interest factors for Clean Energy Plan acknowledgment. If reconciled, the Commission will be blessing double counting even though it has the knowledge, authority, and obligation to prevent it.

(9) ORS 469A.435 (HB 2021 Section 8)

This provision requires the Commission, when determining whether a retail electricity provider has complied with the clean energy targets, to “take into consideration unplanned emissions in excess of the amount projected in an electric company’s clean energy plan” such that the “emissions are in excess” of the clean energy targets, non-emitting resources generated less energy than expected and “additional emissions are ... necessary to meet *load*.”⁷⁶ This provision is telling of a load-based program: even the provision that addresses a scenario where utilities cannot meet the clean energy targets is based on whether the “additional emissions” are “necessary” to provide electricity to *retail customers to meet load*. Only a load-based program

Multnomah County Office of Sustainability, Re: The Multnomah County Office of Sustainability supports the -5 amendment to HB 2021 (April 5, 2021),

<https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/23859>.

⁷³ PGE, Clean Energy Plan and Integrated Resource Plan, *supra* note 1.

⁷⁴ OR. REV. STAT. § 469A.430.

⁷⁵ Deborah Kapiloff, *supra* note 49, at 8.

⁷⁶ OR. REV. STAT. § 469A.435(1)(a) (emphasis added).

contemplates such a situation. A generation-based program does not take into account the *needs* of customers. As such, this provision highlights that the Oregon legislature sought the clean energy program to protect customers from brownouts or blackouts, even if that meant a delay in achieving the clean energy targets.

(10) ORS 469A.460 (HB 2021 Section 13)

Finally, ORS 469A.460 states that “[t]he requirements of sections 1 to 15 of this 2021 Act do not replace or modify the requirements of [Oregon’s Renewable Portfolio Standards].”⁷⁷ Oregon’s Renewable Portfolio Standard (RPS) and HB 2021 are not mutually exclusive. As suggested in the PUC REC workshop, Oregon’s RPS and HB 2021 can and should coexist.⁷⁸ However, as noted above, the requirements for non-emitting energy sources required by HB 2021 will soon surpass Oregon’s RPS, leaving it with little meaningful impact.⁷⁹ Rather, the Commission should recognize that HB 2021 is a renewal of the state’s commitment to expanding renewable energy generation and providing retail customers with a 100% clean energy claim.

In sum, based on the text and context of HB 2021, the law supports a load-based program. The law could certainly have been written in a more straightforward way, but the Commission cannot avoid choosing one path at this crossroads. Ramifications flow from that choice. An interpretation that HB 2021 is a load-based program, and the decisions that will naturally flow from that choice will benefit customers by providing them with clean energy, reducing risks to the utilities and customers from improper claims and the unintentional consumption of RECs, and signaling a strong climate policy that is consistent with policies in neighboring states.

B. A Generation-Based Program is Not a Silver Bullet to Address Double Counting Risks and, In Fact, Will Impose New and Confusing Requirements

A determination by the Commission that HB 2021 is a generation-based program must address the resulting ramifications. Such a statutory interpretation will necessitate additional modifications to HB 2021 to address double counting that are counterintuitive to the law’s intent, will be confusing to retail customers, and will impact how the utilities achieve the clean energy targets.

This section identifies **five new** requirements the Commission would need to implement for a properly operating generation-based program. The fifth requirement is discussed in Part II.C First, the Commission will need to address that any renewable energy used for HB 2021 compliance unmatched with associated RECs is null electricity. Second, the Commission will need to establish a perplexing and precedent-setting boundary, the details of which we describe below. Third, the Commission must track earnings from the sale of associated RECs to ensure ratepayers accrue the benefits of associated REC sales. Fourth, the Commission must ensure utility marketing is consistent with state and federal consumer protection mandates, which we discuss in Section II.C. These new and confusing requirements illustrate that a generation-based path will be bumpy.

(1) Null electricity requires an emissions factor. As discussed in Part II.A.4, associated RECs must be matched with renewable energy generation in order for the generation to retain its zero-

⁷⁷ OR. REV. STAT. § 469A.460.

⁷⁸ OPUC, Workshop on RECs, *supra* note 15.

⁷⁹ See PGE, Clean Energy Plan and Integrated Resource Plan, *supra* note 1.

emission attribute. However, under a generation-based program, Oregon’s utilities can unbundle associated RECs from the electricity generated and sell the RECs to a third party. When that sale occurs, the unbundled REC buyer obtains 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.

Accordingly, Oregon’s utilities must account for having transferred the zero-emissions attributes of the energy to the REC buyer in their reports to DEQ. As discussed in a related rationale discussed in Part II.A.4 examining the text and context of ORS 469A.430, the Commission should require the utilities to ensure that documents, filed in various dockets, are reconciled as to the zero-emissions information it supplies to DEQ.⁸⁰ The zero-emissions attributes represented in DEQ reports should not be greater than the balance of zero-emissions attributes the utilities have represented control over in other documentation. Otherwise, the utilities will not have appropriately maintained their records.⁸¹

As such, under a generation-based program, where a utility sells all or some of its associated RECs to third parties—which results in the delivery of null electricity to Oregon’s customers—the utility must work with DEQ to determine an appropriate emissions factor to apply to null electricity. For example, an appropriate emissions factor to apply to null electricity would be DEQ’s unspecified power emissions factor of 0.428 MT CO₂e/MWh to achieve accurate reporting.⁸² Failing to address that accounting will result in an over-representation of renewable energy and an under-representation of emitting energy on the grid. This double-counting is antithetical to the purpose of HB 2021.

(2) A boundary for generation serving load will be confusing. Generation-based accounting programs typically regulate sources within a boundary.⁸³ However, HB 2021 does not establish such a boundary because it is based on the *delivery to retail customers*. And selecting sources for a generation-based program based on load will *sound* like and *operate* like a load-based program.

As Mr. Jones with the Center for Resource Solutions commented during the PUC REC workshop, it would be counterintuitive and confusing for the Commission to interpret HB 2021 as regulating sources from which electricity is *purchased* but not generation that is *delivered to customers* to avoid double counting.⁸⁴ It is confusing because that is what a *load-based program* does. This confusion will be especially true for stakeholders, the media, as well as entities that must properly describe the boundary for regulatory purposes.

Moreover, the fact that there are no generation-based programs in the U.S. with such a counterintuitive boundary should tell the Commission something about the complications of interpreting the law in this way.⁸⁵ Rather, generation-based programs typically use state borders. For example, North Carolina’s HB 951/ SL 2021-165, enacted in 2021, requires the state’s

⁸⁰ OR. REV. STAT. § 756.090.

⁸¹ *Id.*; see also OR. REV. STAT. § 756.990(1) (penalties available for failure to comply with an order or subpoena issued pursuant to ORS 756.090).

⁸² OR. ADMIN. R. § 340-215-0120(2)(a).

⁸³ Center for Resource Solutions, Guide to Electricity Sector Greenhouse Gas Emission Totals 8 (2022), <https://resource-solutions.org/wp-content/uploads/2022/11/Guide-to-Electricity-Sector-Greenhouse-Gas-Emissions-Totals.pdf>.

⁸⁴ OPUC, Workshop on RECs, *supra* note 15 at 2:09 min.

⁸⁵ *Id.*

Utilities Commission to “take all reasonable steps to achieve a seventy percent (70%) reduction in emissions of carbon dioxide (CO₂) emitted in the State from electric generating facilities owned or operated by electric public utilities from 2005 levels by the year 2030.”⁸⁶ Unlike HB 2021, HB 951 uses the state’s borders as the boundary, and applies to all electric generating facilities whether used to deliver load or export electricity out of state.

In contrast to HB 2021, North Carolina’s HB 951 applies to all generation sources owned by utilities that serve a certain number of customers, regardless of exports. And, unlike HB 2021, North Carolina regulators do not track the amount of generation used by the retail load. The obvious differences between HB 951 and HB 2021 should inform the Commission how to interpret HB 2021. Further, the Commission should neither underestimate the impact of contorting HB 2021 to create a strange boundary only for load-serving entities based on load nor that no other state has something similar.

(3) Tracking of REC Sales to Benefit Ratepayers. If the Commission treats HB 2021 as a generation-based program, it will need to carefully track unbundled associated REC sales. The utilities must place all earnings in a restricted account and expend them to benefit ratepayers and the state’s clean energy transition. The Commission should not permit the utilities to issue shareholder dividends based on earnings from REC sales. As such, even if the Commission determines that HB 2021 is a generation-based program, it will need to track and provide regulatory oversight of earnings from REC sales.

Moreover, the utilities will have a new income stream: exports of thermal power so long as the exports do not “significantly increase the gross carbon dioxide emissions.”⁸⁷ Although this income stream means that front-line communities will continue to experience the same (or slightly worse) air quality and related health concerns, the income should be used to ease the cost of meeting the clean energy targets.

(4) Unintentional consumption of RECs. Under a generation-based program, there is also concern that the GHG reports submitted to DEQ by the utilities will result in *inadvertent* consumption of associated RECs. OAR 340-215-0120 states a utility is required to “report ... emissions related to the generation of *electricity delivered or distributed to end users in this state during the previous year, regardless of whether the electricity was generated in [Oregon] or imported.*”⁸⁸ Inadvertent consumption of a REC can occur by claiming delivery or use of the “emissions” associated with renewable energy, which results in double counting if the REC is sold.⁸⁹ Here, the intent of the DEQ report is to establish the level of emissions associated with generation delivered to customers, including renewable energy generation that produced RECs. Because the report is identifying the *same* emissions the report is a claim in and of itself to the associated RECs. This inadvertently consumes the REC, resulting in double counting if the REC is sold, and poses legal risk to the utilities for doing so.

⁸⁶ N.C. GEN. STAT. § 62-110.9 (2021), https://www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_62/GS_62-110.9.pdf.

⁸⁷ OR. REV. STAT. 469.413(1).

⁸⁸ OR. ADMIN. R. §340-215-0120.

⁸⁹ Jeremy D. Weinstein, *What Are Renewable Energy Certificates?* 41 *Futures & Derivatives Law Report* 5, 11-12 (Jan. 2021),

[https://www.enviromarkets.org/resources/Documents/What%20Are%20Renewable%20Energy%20Certificates%20by%20J.%20Weinstein%20-%2041%20Fut.%20and%20Derivs.%20L.%20Rep.%20\(Jan.%202021\).pdf](https://www.enviromarkets.org/resources/Documents/What%20Are%20Renewable%20Energy%20Certificates%20by%20J.%20Weinstein%20-%2041%20Fut.%20and%20Derivs.%20L.%20Rep.%20(Jan.%202021).pdf).

C. A Generation-Based Program Poses Risk to Utilities and Ratepayers

A determination that HB 2021 is a generation-based program poses risks to utilities and ratepayers. These risks arise from the potential to violate federal and state laws intended to protect consumers. We begin by discussing a pre-enforcement example of potentially improper renewable energy claims under the FTC's Green Guides. Next, we proceed to Oregon's Unfair Trade Practices Act, which allows for punitive damages under certain claims. Finally, we outline Commission imposed guidelines around environmental marketing claims that would be necessary should the Commission choose the generation-based program path.

1. *The FTC's Pre-enforcement Letter related to RECs and Double Counting Offers a Warning*

Fewer than ten years ago, an FTC pre-enforcement action took place that now offers lessons to the Commission should it proceed down the generation-based program path without first mitigating the potential to mislead Oregon's retail electricity consumers.

In 2015, the FTC Division of Enforcement issued a staff letter that addressed renewable energy and associated REC claims and double counting principles under the Green Guides. Following a petition,⁹⁰ staff at the FTC Division of Enforcement sent a letter to Green Mountain Power Corporation (GMP), a vertically integrated utility in Vermont, regarding its allegedly deceptive statements to its customers about the environmental attributes of its renewable energy generation facilities.⁹¹ At that time, GMP developed wind and solar projects and sold most of the RECs generated from its renewable energy projects to entities outside the State of Vermont.⁹²

The FTC Division of Enforcement's letter documented several examples of GMP's reportedly deceptive claims, such as: "Kingdom Community Wind means clean renewable energy built in Vermont for Vermonters" and "We have always believed that this wind resource would provide a clean, cost-effective energy resource for Vermonters, and this upgrade is helping us achieve that goal."⁹³ The FTC enforcement letter explained that in the petitioner's view, GMP's statements about "clean renewable energy" could mislead consumers to believe they received the environmental attributes, e.g., "clean energy" derived from a REC, when in fact, GMP sold the RECs to out-of-state third parties.⁹⁴

The FTC letter explained that RECs are an "important tool for the renewable electricity market," and there are "two components" under the REC system: "(1) the electricity itself (i.e., "null" electricity); and (2) certificates representing the renewable attributes of that electricity."⁹⁵ Therefore, entities that purchase RECs can "characterize all or a portion of their electricity usage as "renewable," and entities selling electricity without a REC cannot characterize their electricity

⁹⁰ Petition to Investigate Deceptive Trade Practices of Green Mountain Power Company In the Marketing of Renewable Energy to Vermont Customers 4 (Sept.15, 2014), <http://assets.law360news.com/0577000/577562/FTC%20Petition%209%2015%20%281%29.pdf> [hereinafter Petition to Investigate GMP].

⁹¹ FTC Division of Enforcement Staff Letter to Green Mountain Power Corporation (Feb. 2, 2015), https://www.ftc.gov/system/files/documents/public_statements/624571/150205gmpletter.pdf [hereinafter FTC Division of Enforcement, Staff Letter to GMP].

⁹² Petition to Investigate GMP, *supra* note 90, at 4.

⁹³ FTC Division of Enforcement, Staff Letter to GMP, *supra* note 91 at 2.

⁹⁴ *Id.*

⁹⁵ *Id.* at 2-3.

as having “renewable attributes.”⁹⁶ The FTC also noted that it was insufficient to provide disclosures on the company’s website because not all consumers who read the “problematic claims” will review the disclosures on the website.⁹⁷

According to the FTC, if the associated RECs are sold, then “any statement by the company that might lead consumers of that electricity to infer that the energy was produced cleanly risks double counting.”⁹⁸ Double counting “not only risks deceiving consumers but also threatens the integrity of the entire REC market.”⁹⁹ As such, per the FTC, when a utility sells the RECs, it has “transferred its right to characterize its electricity as renewable.”¹⁰⁰ Quoting the Green Guides, the enforcement letter explained that if “a marketer generates renewable electricity but sells renewable energy certificates for all of that electricity, it would be deceptive for the marketer to represent, directly or by implication, that it uses renewable energy.”¹⁰¹ The FTC’s pre-enforcement letter illustrates that utilities must be careful when marketing renewable energy to customers.

2. *The FTC’s Green Guides will require proper disclosure under a generation-based program*

Under a generation-based program, then, the Commission will need to adopt robust rules regarding environmental marketing claims so that the Commission does not facilitate the violation of federal law. Additionally, to address potentially misleading environmental marketing claims, the Commission must provide oversight of qualifications and disclaimers.

To prevent misleading inferences, the FTC requires proper disclosure or qualification. For example, “We generate renewable energy, but sell all of it to others.”¹⁰² Variations of this example are acceptable, but reasonable customers must be able to understand that the utility did not deliver “clean” or “renewable” electricity to them.¹⁰³ Disclosures must be conspicuous and carry equal weight to the environmental claim it is intended to qualify.

The Commission should require adequate disclosures for all HB 2021-related marketing and regulatory materials, such as the clean energy plans and CBIAG reports, now intended for broader audiences.¹⁰⁴ To avoid misleading customers, avert litigation by the REC owner with the rightful claim to the renewable energy zero-emission attribute, and avoid facilitating a federal law violation, the Commission should ensure that the utilities properly disclose the sale of RECs when making any environmental marketing claims related to “emissions” or “clean energy” or “non-emitting” resources. To say the least, the utility’s environmental marketing will necessarily

⁹⁶ *Id.* at 3.

⁹⁷ *Id.* at 5-6.

⁹⁸ *Id.* at 3 (emphasis added).

⁹⁹ *Id.*

¹⁰⁰ *Id.* (emphasis added). As discussed above, even if HB 2021 only applies to “non-emitting generation,” some of that generation will include renewable energy sources like solar and wind, which produce a REC under Oregon law. Using non-emitting to blanket over renewable energy generation would be a conflict with the Green Guides’ because it is “likely to mislead consumers acting reasonably under the circumstances and is material to consumers’ decisions.” 16 § CFR 260.2.

¹⁰¹ *Id.* (quoting 16 CFR § 260.15(d) (emphasis added)).

¹⁰² 16 CFR § 260.15, Example 5.

¹⁰³ The Green Guides: Statement of Basis and Purpose, Fed. Trade Comm’n., *supra* note 8 at 224.

¹⁰⁴ OR. ADMIN. R. §860-027-0400(5) (“The CEP must be written in language that is as clear and simple as possible, with the goal that it may be understood by non-expert members of the public.”).

become circumspect and scrutinized by stakeholders to ensure unintentional consumption of RECs does not occur and that consumers are not misled about the type of energy they receive.

Finally, on a related note, one could argue that HB 2021 seeks to achieve the clean energy targets through non-emitting resources and those resources fall outside of the FTC’s guidance; however, if some of the non-emitting generation produces a REC which is then sold, at least a portion of that non-emitting generation is not “clean”—it is null. To state otherwise would be counter to the Green Guides’ assertion that “[a] representation, omission, or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers’ decisions.”¹⁰⁵ There is little doubt that Oregon electricity customers think that at least *some* of the non-emitting generation comes from renewable energy sources (if not all)—and that same renewable energy will produce a REC that may not be sold if the utilities wish to tout their clean energy achievements.¹⁰⁶

3. Oregon’s Unfair Trade Practices Act and Washington’s Consumer Protection Laws Pose Risks to Utilities and their Customers

Similarly, the Commission should be cognizant of Oregon and Washington consumer protection laws. Consideration must be given to the implications of choosing a generation-based path that may inadvertently bless false utility messages about clean energy delivery that constitute consumer fraud. Similar to the FTC Green Guides, without associated REC retirement, the utilities have no right to depict wind turbines and solar panels in bill inserts, on websites, or in press releases. The utilities must inform reporters and the public that they generate renewable energy and sell it all to others (or buy null electricity from a developer who sells the associated REC).

One source of litigation risk comes from Oregon’s Unlawful Trade Practices Act (UTPA), which lists unlawful business practices that harm Oregonians.¹⁰⁷ Violations of the UTPA may be brought by the injured party or by the Attorney General or other prosecuting attorney.¹⁰⁸ If a public entity bringing the action is successful, a court may enjoin the violation, impose restitution obligations, and levy penalties for willful violations of the UTPA.¹⁰⁹ A private right of action may be brought to recover actual or statutory damages—and punitive damages—as well as equitable relief, if the person “suffers an ascertainable loss of money or property, real or personal” attributable to a willful violation of the UTPA.¹¹⁰ Attorneys fees are available to a prevailing plaintiff, and only to a prevailing defendant if no objective, reasonable basis for the action existed.¹¹¹

Any cause of action would depend on the facts, but the Commission should consider whether a generation-based path that does not require the retirement of RECs, and does not demarcate the

¹⁰⁵ 16 CFR 260.2.

¹⁰⁶ See, e.g., Written testimony from Diane Ware, supporting proposed HB 2021 (“bill”) and solar energy; Robin Bloomgarden supporting the bill and “clean energy, like wind and solar;” James Freeman, supporting the bill and supporting the wind industry; Diane Tegtmeier, supporting the bill solar energy, H.B. 2021, 2021 Leg., 81st Assemb., Reg. Sess. (Or. 2021), <https://olis.oregonlegislature.gov/liz/2021R1/Measures/Testimony/HB2021>.

¹⁰⁷ OR. REV. STAT. §§ 646.605 to 646.656.

¹⁰⁸ OR. REV. STAT. § 646.632 (public enforcement); OR. REV. STAT. § 646.638 (private civil action).

¹⁰⁹ OR. REV. STAT. § 646.542.

¹¹⁰ OR. REV. STAT. § 646.638(1).

¹¹¹ OR. REV. STAT. §§ 646.638(3) and (4).

ways in which HB 2021 can be discussed in marketing, puts the utilities at risk of facing a claim based on the UTPA. A number of different provisions might apply, but consider the following unlawful act:

[I]f in the course of the person’s business . . . the person . . . [r]epresents that real estate, goods, or services have sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities that the real estate, goods or services do not have or that a person has a sponsorship, approval, status, qualification, affiliation, or connection that the person does not have.¹¹²

Under a generation-based program, an Oregon residential consumer, who believes she is receiving “clean electricity” based on her utility’s environmental marketing claims, learns she is not receiving “clean electricity” because a business acquired the right to make that claim, could bring a claim under UPTA against the utility.

Washington’s consumer protection law is even more powerful than the UPTA. If RECs associated with renewable power delivered to Oregon customers are sold in Washington, the utilities might be subject to Washington’s Consumer Protections Act (CPA).¹¹³ Although the lawsuit was dismissed because municipally-owned utilities are not subject to the CPA, the Commission should take note of a recent case, brought by the Sauk-Suiattle Indian Tribe, in which the Tribe asserted that the City of Seattle’s statements about the “greenness” of its hydroelectric power were deceptive.¹¹⁴ A risk of litigation, even if unsuccessful, should be a reason to carefully consider the appropriate approach.

In short, while the Commission’s authority does not typically extend to protecting consumers from misrepresentations, it must face the reality that a generation-based program opens a can of worms. To address these concerns, if the Commission concludes HB 2021 is a generation-based program, its Order should state that HB 2021 does not provide: (1) Oregon utilities with renewable energy delivery claims¹¹⁵ and (2) Oregon retail electricity consumers with renewable energy use claims.

D. A Load-Based Program Does Not Inherently Conflict with Involvement in a Day-Ahead Market and Wholesale Electricity Markets

The Oregon legislature provided legislative findings¹¹⁶ acknowledging the potential for the development of organized markets in the West. Legislative findings are akin to “statements of statutory policy” and are considered “useful context for interpreting a statute.”¹¹⁷ As such, under Oregon law, ORS 469A.475 should not be a primary consideration in the Commission’s decision, but rather the Commission should view HB 2021’s legislative finding as “context” for its decision.

¹¹² OR. REV. STAT. § 646.608(1)(e).

¹¹³ WASH. REV. CODE § 19.86.010, et seq.

¹¹⁴ *Sauk-Suiattle Indian Tribe v. City of Seattle*, No. 83632-3-1, 2023 Wash. App. LEXIS 417 (Wash. Ct. App. Mar. 6, 2023) (The Tribe lost its claim under Washington law for false advertising, but only because it did not meet the specific element of the tort that the false claim was made for the purpose of selling more electricity).

¹¹⁵ Such an order would not be required in the event RECs are retired. Retirement of associated RECs can substantiate claims, but it is the Commission’s responsibility to facilitate easy confirmation of such substantiation.

¹¹⁶ OR. REV. STAT. § 469A.475.

¹¹⁷ *Providence Health System Oregon*, *supra* note 6.

Utilities engaged in wholesale markets and organized under regional transmission operations (RTOs) or independent system operators (ISOs) utilize RECs to meet their state’s load-based program requirements.¹¹⁸ Generally speaking, utilities organized under an RTO/ISO or vertically integrated utilities that have access to markets can procure power through spot markets, including real-time, hour-ahead, and day-ahead energy sales. The primary objective of an electricity market is to match electricity supply to demand so that all anticipated load is fulfilled.

In a wholesale electricity market, pricing is set by the uniform clearing price (or market clearing price). Price adders or other policy-related pricing adjustments can be made to influence the stacking of bids; however, state programs must not “cause clear damage to federal goals” established by the Federal Power Act.¹¹⁹

As PUC staff explained in the workshop, in a day-ahead market, states that have GHG price adders may impact the price and, therefore, the likely outcome of which generation will clear the uniform clearing price.¹²⁰ However, participation in a market does not change the fact that sources of generation are indistinguishable once the electricity is on the grid. To account for delivery and use of “clean” energy in wholesale electricity markets and to allow states to meet their RPS compliance requirements or clean energy standards, states use RECs.¹²¹

Although there is no one size fits all solution for GHG accounting in markets, there is awareness that proper accounting—that prevents double counting—is necessary for states to meaningfully implement their climate laws. In a recent Utility Dive opinion piece, Abigail Anthony, a commissioner with the Rhode Island Public Utilities Commission, used the analogy of an employer attempting to reconcile various employee dinner bills, where all the employees circled the same expensive meal, to the task before states: reconciliation of shared sources of power, or a “multi-billion-dollar” meal.¹²² Today, using RECs is Oregon’s best method to reconcile our electricity use, or our very large and expensive meal.

In her opinion piece, Commissioner Anthony conveyed that unless states are always willing to pay more and always willing to claim the greater source of emissions, emissions reporting can no longer be done independently. She stated:

If one consumer claims to use energy that is cleaner than the average system emissions, the remaining consumers must be assigned energy with higher-than-average emissions. Any other outcome would defy reliable accounting and could

¹¹⁸ For example, California retail suppliers, which operate under an RPS, operate an ISO. *See* SB 100 Joint Agency Report, *infra* note 131. New York, which adopted the Clean Energy Standard and which also has an ISO, requires load serving entities to procure various tiers of RECs. *See LSE Obligations*, Clean Energy Standard, <https://www.nyserda.ny.gov/All-Programs/Clean-Energy-Standard/LSE-Obligations> (last accessed July 21, 2023).

¹¹⁹ *Coal. for Competitive Elec. Dynergy v. Zibelman*, 906 F3d 41, 56-57 (2nd Cir. 2018) (FER has “sanctioned state programs that increase capacity or affect wholesale market prices, . . . [this] includes “mak[ing] clean generation ‘more competitive in a cost comparison with fossil-fueled generation.’”).

¹²⁰ OPUC, Workshop on RECs, *supra* note 15.

¹²¹ *See LSE Obligations*, Clean Energy Standard, <https://www.nyserda.ny.gov/All-Programs/Clean-Energy-Standard/LSE-Obligations> (last accessed July 21, 2023).

¹²² Abigail Anthony, *Bigger meals require better receipts: A call for coordinated greenhouse gas emissions tracking*, Utility Dive (July 12, 2023), <https://www.utilitydive.com/news/greenhouse-gas-ghg-carbon-emissions-accounting-rhode-island-puc/686587/>.

lead to inefficient and confusing outcomes such as customers paying twice to be 100% clean or actual emissions that escape allocation.¹²³

Moreover, if, say Oregon were to “buy clean electricity from a generator in another state and claim it in [its] emissions profile,” Oregon “need[s] to know that the host state isn’t also including that same generation in their emissions profile. . . . Thus, most jurisdictions, if not all, need a system that enables entities to make rightful claims to their emissions, and rightful claims to what is not their emissions.”¹²⁴

For example, the New England Power Pool Generation Information System (NEPOOL-GIS), which Commissioner Anthony writes about, is utilized to provide “consistent accounting, transparent settlement and ironclad validation that each consumer’s energy use and emissions are mutually respected and exclusive.”¹²⁵ NEPOOL-GIS “issues and tracks certificates for all MWh of generation and load produced in the ISO New England control area, as well as imported MWh from adjacent control areas.” NEPOOL-GIS works with load-based programs that track more than renewable energy, including “combined heat and power, demand response and conservation and load management certificates.”¹²⁶ Related to RECs, NEPOOL-GIS is used to transfer, retire, and manage RECs to support various state policies that operate in a market system. Needless to say, wholesale electricity markets and RECs can coexist; a generation-based program is not a necessity for engagement in wholesale electricity markets. In fact, such a decision would leave states, utilities, and customers without a legal basis to support the delivery of “clean” electricity to customers.

In fulfilling the Oregon legislative intent to “coordinate and collaborate with other states” and “achieve the goal of aligning accounting methodologies,” it is important to set the record straight as to what type of GHG accounting programs exist in Washington and California.¹²⁷ Oregon’s neighboring states have enacted load-based programs to deliver clean electricity to customers and also buy power in wholesale electricity markets.

Contrary to information provided at the Commission’s workshop, for example, the State of Washington Clean Energy Transformation Act (CETA) is a load-based program. CETA requires the use of RECs to track the delivery of renewable energy to load.¹²⁸ Specifically, CETA requires that “each utility . . . verify and document by the retirement of RECs all electricity from renewable resources used to meet a target in an interim performance target.”¹²⁹ Importantly, CETA recognized the potential for double counting to occur under CETA, stating:

A REC is not eligible under this section if the utility sells or otherwise transfers ownership of the electricity associated with the REC in a transaction that (a)

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *NEPOOL GIS User Guide*, NEPOOL-GIS 1 <http://nepoolgis.com/wp-content/uploads/sites/3/2018/01/NEPOOL-GIS-User-Guide-FINAL.pdf> (last accessed July 19, 2023).

¹²⁷ OR. REV. STAT. § 469A.475.

¹²⁸ WASH. ADMIN. CODE §§ 194-40-400, 194-40-410, 194-40-415, 194-40-420 (describing the requirements and use of RECs for compliance reporting for Washington’s 100% clean electricity standard).

¹²⁹ WASH. ADMIN. CODE §§ 194-40-400(2).

contractually specifies the source of the electricity by fuel source or as renewable or (b) *transfers the nonpower attributes of the electricity*.¹³⁰

CETA illustrates that double counting is a valid concern, that double counting is detrimental to climate policy, and that states are in a position to address it. Ultimately, CETA allows utilities to deliver “clean electricity customers” and forestalls the ability for non-power attributes to be double counted. Given CETA’s aim to prohibit double counting, it is unlikely that Washington will set aside this commitment when it more fully engages in wholesale markets.

California utilities and generators, which operate under the California ISO, must abide by two load-based programs and a cap and trade program. California’s RPS program uses RECs as the compliance instrument and has set a RPS of 60% by 2030.¹³¹ California’s Power Source Disclosure program, which gives retail energy customers a window into the sources of energy delivered to them by their retail suppliers, also uses bundled and unbundled RECs.¹³²

California’s *cap and trade program* is viewed as a generation-based program; it uses tradable allowances (equal to one MTCO_{2e}) to reduce emissions from covered entities (generators) by setting a “cap” on statewide GHG emissions. California’s cap and trade program does not use RECs as an instrument for tracking. It uses allowances (similar to other cap-and-trade programs); the program was neither intended to result in 100% clean energy nor are its regulations based on sales to retail customers. As California’s cap and trade program is a program that regulates generators (distinct from California’s retail suppliers), there is less of a concern about the environmental marketing claims made by retail suppliers.

HB 2021 is not a cap-and-trade program.¹³³ Comparisons to California’s cap and trade program—and other similar programs—are misplaced and detrimental to the implementation of HB 2021 because the *instruments* and the *intent* of the programs are different.

Finally, as Oregon decision-makers enter into negotiations of an independently governed West-wide wholesale market and RTO, Oregon should have a strong and clear commitment to clean energy—a program that does not allow the sale of a REC already consumed by the utilities to meet their clean energy targets.¹³⁴ One way to do this is by supporting an attribute-based GHG

¹³⁰ WASH. ADMIN. CODE §§ 194-40-410(5) (emphasis added). CETA also contains a provision dedicated to safeguarding the double counting of unbundled RECs used to satisfy up to 20% of its program requirements. WASH. ADMIN. CODE §§ 194-40-420.

¹³¹ California’s “100 Percent Clean Energy Act of 2018” (SB 100) updated the state’s RPS and set a goal that by 2045, “all retail electricity sold” in the state and state agency electricity needs would be met with “renewable and zero-carbon resources.” Compliance with the state’s RPS is determined by the amount of RECs retired within the established compliance periods. See *SB 100 Joint Agency Report*, Cal. Energy Comm’n., <https://www.energy.ca.gov/sb100> (last accessed July 21, 2023); *60% RPS Procurement Rules*, Cal. Public Util. Comm’n., <https://www.cpuc.ca.gov/industries-and-topics/electrical-energy/electric-power-procurement/rps/rps-compliance-rules-and-process/60-percent-rps-procurement-rules> (last accessed July 21, 2023).

¹³² *Power Source Disclosure Program*, Cal. Energy Comm’n. <https://www.energy.ca.gov/programs-and-topics/programs/power-source-disclosure-program> (last accessed July 21, 2023)

¹³³ Anthony Macuk & Pat Dooris, *Gov. Kate Brown’s executive version of cap-and-trade nears the finish line*, KGW8 (December 8, 2021, 7:23 PM PST), <https://www.kgw.com/article/tech/science/climate-change/oregon-cap-and-trade-program/283-1dd5bf6c-e0fc-42ec-87b5-d5c3c05786b3>.

¹³⁴ David Danner, et. al. RE: State regulators’ call for viable path to electricity market inclusive of all western states, with independent governance (July 14, 2023), <https://www.westernenergyboard.org/wp-content/uploads/Letter-to-CREPC-WIEB-Regulators-Call-for-West-Wide-Market-Solution-7-14-23.pdf>.

accounting framework, which is a load-based “accounting that records generation attributes and assigns them to a specific amount of load through all-generation certificate pairing.”¹³⁵ Attribute accounting “offers flexibility for tracking and compliance under varying state policy requirements for reducing and tracking greenhouse gas emissions,” including load-based programs which require the retirement of RECs.¹³⁶

Under the legislature’s direction to “align” with our neighboring states, which *do* have load-based programs, a “coordinated” result is to establish a load-based program. Moreover, as the Oregon legislature stated, the Commission must “ensur[e] [that] market rules do not undermine state policy objectives.”¹³⁷ Delivering 100% Clean Energy to Oregon electricity customers should remain the top priority.

Further, the legislature issued an invitation to “modif[y]” HB 2021’s “existing accounting and compliance rules to ensure the benefit of market participation” in the future.¹³⁸ By making this overture, the legislature recognized that wholesale electricity markets may require changes in the ways HB 2021 was initially conceived and implemented—recognizing that near-future implementation doesn’t have to be a perfect fit for future markets. The opportunity to modify HB 2021 and related accounting rules is just that—an invitation to return to the legislature when the need arises and reassess what is best for Oregon to continue to meet its clean energy targets.

III. Conclusion

Given that the Commission has inherited a context in which RECs exist and represent the zero-emissions nature of renewable energy, the Commission cannot ignore them now that the utilities are required to reduce their GHG emissions. As we noted above, other Commissioners recognize the importance of acting to prohibit double counting, as well as the role Commissions can take to ensure accurate emissions accounting. A fair reading of the text and context of HB 2021 supports a conclusion that the statute is a load-based program, which requires the retirement of associated RECs. Such an interpretation also happens to fulfill the legislative intent to provide 100% Clean Energy to all, protects Oregon’s ratepayers, and lays a foundation for a strong climate policy that will guide a Western wholesale market and regional transmission operating system.

Sincerely,

/s/ Caroline A. Cilek

OSB #223766

/s/ Carra Sahler

OSB # 024455

Staff Attorneys

Green Energy Institute

10101 S. Terwilliger Blvd.

Portland, Oregon 97219

carolinecilek@lclark.edu

sahler@lclark.edu

In support of:

/s/ Kelly Campbell

Policy Director

Columbia Riverkeeper

1125 SE Madison Suite 103A

Portland, OR 97214

kelly@columbiariverkeeper.org

In support of:

/s/ Rose Monahan

Staff Attorney

Sierra Club

2101 Webster St., Ste. 1300

Oakland, CA 94612

rose.monahan@sierraclub.org

Dated July 24, 2023

¹³⁵ Deborah Kapiloff, *supra* note 49 at 8.

¹³⁶ *Id.*

¹³⁷ OR. REV. STAT. § 469A.475(1)(c).

¹³⁸ OR. REV. STAT. § 469A.475(1)(d).