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 OPENING BRIEF

I. Introduction

Pursuant to the schedule adopted by the Oregon Public Utility Commission ("Commission") in this docket, NewSun Energy LLC ("NewSun") submits this Opening Brief in response to the Phase 1 questions posed by the Commission in its June 5, 2023, Scoping Order. For the reasons articulated below, NewSun requests that the Commission faithfully and meaningfully implement the Legislature's articulated policy of rapidly decarbonizing the power supply of retail electricity providers, in a manner that minimizes burdens on environmental justice communities, maximizes direct benefits to Oregon communities, and protects ratepayers from bearing unjust costs. NewSun requests that the Commission takes this opportunity to reflect on the critical role it plays in ensuring that Oregon's legislative mandate to decarbonize the electric

sector does not become a meaningless kick-the-can exercise, passing the buck to the next generation. Specifically, NewSun recommends that the Commission:

1. Require that greenhouse gas ("GHG") emissions reductions be verifiable through Renewable Energy Certificate ("REC") retirement or a similar mechanism, and that there be a 360-degree REC accounting to ensure that ratepayers are receiving the benefit of the resources they paid for;
2. Define "economic and technical feasibility" to mean that a utility's resource and transmission assumptions used in a Clean Energy Plan ("CEP") must be capable of coming online within the time period specified, and that the cost estimates for such options be within reason;
3. Define the "public interest" as a flexible standard that includes the public generally and communities outside a given utility's service territory, including those that might be located near to fossil facilities;
4. Look to the Section 2 policy statements to substantively guide the Commission in all of its implementation activities, including by requiring that utilities amend their procurement plans to give weight to projects that would minimize burdens on environmental justice communities and maximize direct benefits to Oregon communities; and
5. Require regular, enforceable progress by utilities to ensure the Legislature's decarbonization goals are timely met.

II. Procedural History

In 2021, the Oregon State Legislature passed HB 2021 (the "Act"), which, among other things, requires electric companies and electricity service providers to:

> reduce greenhouse gas emissions…to the extent compliance is consistent with sections 1 to 15 of this 2021 Act, by the following targets:
>
> (a) By 2030, 80 percent below baseline emissions level.
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> (b) By 2035, 90 percent below baseline emissions level.
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> (c) By 2040, and for every subsequent year, 100 percent below baseline emissions level.

(Act §3; ORS 469A.410)

In crafting this mandate, the Legislature clearly and deliberately articulated the policies underpinning it:

> It is the policy of the State of Oregon:
>
> (1) That retail electricity providers rely on nonemitting electricity in accordance with the clean energy targets set forth in ORS 469A.410 and eliminate greenhouse gas emissions associated with serving Oregon retail electricity consumers by 2040;
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> (2) That 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;
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> (3) That, under existing federal and state law, the state engages in meaningful consultation with federally recognized Indian tribes. This includes consultation on the siting, permitting and construction of new energy facilities as defined in ORS 469.300, and new projects subject to the policy specified in 18 C.F.R. 2.1c, prior to such actions that are likely to adversely impact designated sites of archeological significance as defined in ORS 358.905, or properties of traditional, cultural and religious importance under the National Historical Preservation Act and the 36 C.F.R. 800 implementing regulation; and
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> (4) That implementation of ORS 469A.400 to 469A.475 be done in a manner that minimizes burdens for environmental justice communities.

(Act §2; ORS 469A.405)

While the Legislature provided a general framework for the Commission to ensure compliance, the Legislature gave the Commission broad authority to "adopt rules as necessary to implement sections 1 to 15 of this 2021 Act." (Act § 14(1); ORS 469A.465(1)).

In response to the Act, the Commission initiated an investigation as part of this docket "to consider HB 2021 implementation issues…" as outlined in the Commission Staff's Report filed February 10, 2023. In its Scoping Order, the Commission identified two phases for this

investigation, and sought briefing on a number of questions relating to the Phase 1 issues. This Opening Brief addresses those Phase 1 issues.

III. Analysis and Discussion

1. The Commission had broad authority – and indeed the statutory duty – to ensure meaningful decarbonization of the electric grid.

The Legislature did not create the Commission to be an ineffective bureaucracy; it created the Commission with broad jurisdiction over public utilities and the effects they have on the public at large:

> **The commission is vested with power and jurisdiction** to supervise and regulate every public utility and telecommunications utility in this state, and **to do all things necessary and convenient in the exercise of such power and jurisdiction**. (ORS 756.040(2)) (emphasis added).

> The provisions of [laws administered by the Commission] shall be **liberally construed** in a manner consistent with the directives of ORS 756.040(1) **to promote the public welfare, efficient facilities and substantial justice** between customers and public and telecommunications utilities. (ORS 756.062(2)) (emphasis added).

To implement the Legislature's directives, the Commission is vested with the authority to promulgate rules and regulations:

> The Public Utility Commission may adopt and amend reasonable and proper rules and regulations relative to all statutes administered by the commission and may adopt and publish reasonable and proper rules to govern proceedings and to regulate the mode and manner of all investigations and hearings of public utilities and telecommunications utilities and other parties before the commission. (ORS 756.060)

Moreover, the Legislature gave the Commission sweeping tools to enforce Oregon laws falling within the Commission's jurisdiction. Specifically, the Commission has the power, and the duty, to:

- Inquire into any neglect or violation of any law or ordinance relating to public utilities, and report all such violations to the Attorney General (ORS 756.160(1));
- Petition the circuit courts, without bond, to issue injunctions, including mandatory injunctions, and other orders restraining the violation of statutes or related rules, regulations, and orders administered by the commission (ORS 756.180);
- Employ the assistance of the Attorney General, county district attorneys, and law enforcement to assist the Commission in the administration and enforcement of all laws administered by the Commission, and to take legal action against those who violate such laws and related rules, regulations, orders, decisions, or requirements issued by the Commission (ORS 756.160(2)-(3));
- Investigate complaints against any person falling within the Commission's regulatory jurisdiction, conduct hearings related thereto, and issue findings and remedial orders (ORS 756.500-515);
- Impose penalties for violations of statutes administered by the commission, doing any act prohibited or failing to perform any duty enjoined upon the person, failing to obey a lawful requirement or order of the commission, or failing to obey any judgment made by any court upon the application of the commission (ORS 756.990).

Further, while the Commission's standard posture in rate proceedings is to represent the utility's customers, the Commission is legislatively charged with representing both customers "and **the public generally in all…matters of which the commission has jurisdiction**." ORS 756.040(1) (emphasis added). "In respect thereof the commission shall make use of the jurisdiction and powers of the office to protect such customers, **and the public generally**, from

unjust and unreasonable exactions and practices and to obtain for them adequate service[1] at fair and reasonable rates." *Id.* (emphasis added). Oregon courts have repeatedly affirmed the Commission's broad authority and mandate. *See, e.g., Pac. NW Bell Telephone Co. v. Katz*, 121 Or App 48, 53, 853 P2d 1346 (1993), *rev den*, 318 Or 25, 862 P2d 1305 (1993) ("[t]he utility statutes in general reflect a legislative scheme in which the PUC exercises broad powers to protect consumer interests"); *Gearhart v. Pub. Util. Comm'n of Oregon*, 255 Or App 58, 61, 299 P3d 533 (2013), *aff'd* 356 Or 216, 339 P3d 904 (2014) ("[t]he legislature has given the PUC the broadest grant of authority – 'commensurate with that of the legislature itself' – to carry out ratemaking and other regulatory functions"). However, despite the Commission's broad authority, it does *not* have the discretion to *fail* to act when tasked with regulatory oversight by the Legislature. *See NW Climate Conditioning v. Lobdell*, 79 Or App 560, 565, 720 P2d 1281 (1986) (concluding that the Commission did not have statutory discretion to fail to regulate a utility's provision of repair and replacement services).

Under the Act, the Commission is specifically mandated to, among other things:

- "[E]nsure that an electric company demonstrates continual progress…and is taking actions as soon as practicable that facilitate rapid reduction of greenhouse gas emissions at reasonable costs to retail electricity consumers." (Act § 4; ORS 469A.415(6))
- Acknowledge an electric company's CEP "if the commission finds the plan to be in the public interest and consistent with the clean energy targets set forth in [Section 3 of the

[1] As used in ORS chapter 756, the term "service" "is used in its broadest and most inclusive sense and includes equipment and facilities related to providing the service or the product served." ORS 756.010(10); *see NW Climate Conditioning Ass'n v. Lobdell*, 79 Or App 560, 565, 720 P2d 1281 (1986) (utility's repair and replacement activities are "services" subject to Commission's regulatory authority, and Commission did not have discretion to refuse to regulate such services).

Act]," and identify "[a]ny other relevant factors" to be used by the Commission in determining whether the CEP is in the "public interest." (Act § 5(2); ORS 469A.420(2))

- Determine "whether a retail electricity provider has complied with the clean energy targets set forth in [Section 3 of the Act]" and decide whether to approve a non-compliant utility's plan to return to compliance. (Act § 8; ORS 469A.435(1))

Throughout all stages of this implementation, the Commission should begin and end its activities by considering whether it has meaningfully fulfilled these legislative mandates consistent with its general obligation to protect both ratepayers and the public generally from the detrimental effects of greenhouse gas emissions.

2. The Commission should require the retirement of Renewable Energy Certificates ("RECs") or a similar mechanism to ensure greenhouse gas reductions are verifiable. (Issues I(a)(1) and I(b)(2))

The Act unquestionably requires that compliance with reduction in greenhouse gas emissions be *verifiable*. *See* Section 4 (CEPs must "demonstrate" continual progress); Section 5 (emissions verification and compliance); Section 8 (Commission tasked with "determining whether a retail electricity provider has complied with the clean energy targets set forth in [Section 3 of the Act]"). In order to meaningfully implement the Act, the Commission should adopt rules requiring utilities to retire RECs associated with power used to serve Oregon loads, restrict the use of RECs in lieu of retirement, or otherwise require utilities to e-tag power from nonemitting sources in a way that (1) avoids double-counting of environmental attributes, and (2) prevents Oregon ratepayers from subsidizing the costs of nonemitting resources if utilities use the environmental attributes of such resources for compliance with the Act and subsequently sell off the RECs for a profit.

Consider the following scenario: a utility purchases renewable energy for compliance under the Act and charges its ratepayers for the full costs of this clean energy. The utility reports its emissions based upon the environmental attributes of the renewable energy it used to serve its Oregon load. However, the utility subsequently sells the RECs associated with this energy to a third party and uses the profits from that sale to benefit the utility's shareholders. In this scenario, since the utility was not required to retire the REC with the associated power being used to serve Oregon load, the unbundled REC was sold to a third party for the utility's profit, and the third party may use that REC for compliance elsewhere, defeating the deep-decarbonization goals of the Act. Moreover, since the utility was not required to report the use of the REC, ratepayers unknowingly paid for a product they did not receive, resulting in an unjust cost being imposed upon them.

Relatedly, the Commission should ensure that ratepayer-funded fossil fuel assets are reserved for the benefit of ratepayers. For example, consider the following: the utility scales down the amount of fossil resources it uses to serve Oregon ratepayers but continues to sell the output from those plants in the market to out-of-state purchasers. That resource, while initially funded by ratepayers, is now unavailable to the ratepayers should they require its use for reliability or in an extreme weather event. Similarly, by reserving the use of that resource for ratepayers, the utility could also free up the transmission associated with the resource and make that available for the benefit of ratepayers to help with delivering or balancing variable energy.

The Commission has broad discretion to select which method or methods it prefers to ensure true and meaningful compliance – not artificial compliance – with the Act. However, the Commission does not have the discretion to avoid regulating RECs in a way that allows utilities

to "self-report" emissions without verification, and thereby create a very real probability that the Legislature's GHG-emissions standards in Section 3 of the Act will go unmet. Climate change is not mitigated by self-serving statements made on paper; it is mitigated by actual reductions in GHG emissions. As explained above, the Commission is tasked with regulating public utilities, ensuring ratepayers and the public are protected from unjust and unreasonable utility exactions and practices, and "adopt[ing] rules as necessary to implement sections 1 to 15 of [the Act]." (Act § 14(1); ORS 469A.465(1)) Such rules must be designed to ensure appropriate oversight and verifiability of utility-reported GHG emissions and avoid the absurd result of utilities procuring nonemitting resources for compliance in Oregon if they, or other entities, can use those same resources (or an unbundled REC associated with the resource) to purport to be compliant in other jurisdictions or to extract shareholder profits. NewSun cannot conceive of a scenario whereby the Commission would be able to verify a utility's emissions reductions without requiring the retirement of RECs or a similar regulatory scheme.

In addition, and at a minimum, even if the Commission decides not to require retirement of RECs, restricting the use of RECs, or e-tagging from specified resources, the Commission should require a 360-degree REC accounting to ensure that utilities transparently report on the final disposition of RECs associated with power used to comply with the Act. In doing so, the public interest will be served by the transparent reporting of how Oregon utilities use and benefit from RECs associated with power serving Oregon loads, and whether/how those benefits are passed on to the ratepayers that funded the resource. This will further mitigate concerns that Oregon ratepayers might be unknowingly subsidizing utilities' purchases of nonemitting power if the RECs behind that power are later sold for use elsewhere.

3. The Commission should provide guidance on "public interest" factors, including "economic and technical feasibility," consistent with Legislative intent. (Issue I(a)(2))

It is important that the Commission provide early and clear guidance to utilities and stakeholders on what factors the Commission will use in determining whether a CEP is in the "public interest." Those factors, including those enumerated in the Act and those to be determined by the Commission, must be consistent with the Legislature's policies articulated in Section 2 of the Act.

The Commission should specifically identify what "economic and technical feasibility" means for CEPs. In doing so, the Commission will mitigate the possibility that utilities put all of their eggs in a resource basket that does not have a reasonable likelihood of timely and cost-effectively meeting the Legislature's GHG-emission-reduction goals in Section 3 of the Act. NewSun believes that "technical and economic feasibility" should be interpreted to mean that a utility's resource and transmission assumptions used in a CEP must be capable of coming online within the time period specified and that the cost estimates for such options be within reason.[2] By way of example, Portland General Electric cannot rely upon Wyoming wind is coming into its portfolio in 2026 if it cannot reasonably demonstrate it will have transmission available to bring it to load, and PacifiCorp cannot rely upon new nuclear resources coming into its portfolio in 2028 if it cannot reasonably demonstrate that the resources will be permitted, financed, constructed, and

[2] NewSun understands the phrase "technical and economic feasibility" to be a "delegative term" under the analysis offered in *Qwest Corp. v. Pub. Util. Comm'n*, 205 Or App 370, 379-80, 135 P3d 321 (2006), *rev den*, 342 Or 46, 148 P3d 915 (2006). A "delegative term" is one that "express[es] incomplete legislative meaning that the agency is authorized to complete…[I]f the legislature granted authority to the agency to complete the meaning of a delegative term, we will defer to the agency's interpretation so long as it is consistent with the legislature's purpose." *Id.*

online in time. Time is of the essence for utilities to show how they will use technically proven, cost-effective resources to reduce their GHG emissions.

Nothing illustrates this more than the fact that there is time for only one Integrated Resource Plan ("IRP") and Request for Proposals ("RFP") cycle before the first emissions deadline in 2030. The schedule for each of the utilities' IRPs calendars acknowledgment for January and April 2024, meaning that next IRPs will not be due until January and April 2026,[3] leaving less than four years to acknowledge that IRP, issue one or more RFPs, and negotiate, procure, and construct any additional resources to meet the 2030 target, assuming there are no delays or extensions. There is simply not enough time to procure substantial additional resources based on that next IRP/CEP cycle in time to have them online by 2030. As such, it is extremely important for the Commission to devote additional time, resources, and effort now to ensure that this 2023 IRP/CEP cycle is robust, economically and technically feasible, in the public interest, and calculated to actually reach that 2030 target.

Last, the Commission should clarify in its "public interest" factors that the "public interest" also includes non-ratepayers and "the public generally,"[4] including but not limited to communities located near gas plants that are more directly impacted by their emissions and pollution. In weighing the "public interest" the Commission should place particular emphasis – and give considerable weight – to actions that maximize direct benefits to Oregon communities (through creating and sustaining meaningful living wage jobs, promoting workforce equity, and increasing energy security and resiliency), and minimize burdens on environmental justice communities, consistent with Section 2 of the Act.

[3] OAR 860-027-0400(3).
[4] *See* ORS 756.040(1).

4. The Legislature's clear policy in Section 2 of the Act should substantively guide the Commission in all implementation activities. (Issue I(a)(3))

NewSun initially observes that the Commission's question posed in Issue I(a)(3) reflects a false dichotomy between "operative provisions" and "statements of policy." Section 2 of the Act provides substantive guideposts, to which the Commission's implementing activities must be tethered. The Legislature made this abundantly clear by requiring implementation to be "consistent with sections 1 to 15 of this 2021 Act."[5]

The Commission's Scoping Order indicates that the Commission sees little "additional relevance" to the Section 2 policy statements. (Order 23-194 at 5) The Scoping Order also oddly notes that "policy statements generally will not lead us to alter our interpretation of clear language used in the operative sections of the law," even when no party has suggested otherwise. The Commission appears intent on disregarding – or at the very least minimizing the importance of – the Section 2 policy statements as merely precatory statements by the Legislature, when in fact they are perhaps among the most important provisions of the Act, as they underscore the Legislature's intent and purpose underlying every other provision. "While it is true that a policy statement…should not provide an excuse for delineating specific policies not articulated in the statutes, such a general purpose statement may serve as a contextual guide for the meaning of a particular statute." *Warburton v. Harney Cnty.*, 174 Or App 322, 329, 25 P3d 978 (2001), *rev den*, 332 Or 559, 34 P3d 1177 (2001) (finding Legislature's general policy statement toward maximizing preservation of agricultural land supported LUBA's interpretation of statutory term).

[5] As identified in NewSun's June 28, 2023, Motion for Clarification, multiple "operative sections" of the Act incorporate by reference the policy objectives set forth in Section 2, including Sections 3, 4, 7, 8, 9, 10, and 14. When read in its entirety, the text and context of the Act clearly contemplates that Section 2 is an "operative section" of the statute.

There is no facial conflict between the policy set forth in Section 2 of the Act and the statute's other provisions. The Commission, as an administrative agency, is a creature of statute, deriving its powers and authority from the Legislature and the statutes it enacts. In implementing the statute, the Commission's discretion is bounded by its duty to adopt rules consistent with the legislature's intent.[6] Nothing could be more clear than the "policy of the State of Oregon" articulated by the Legislature in Section 2. And upon enactment of HB 2021, for example, Representative Ken Helm stated that "I understand this language to mean that the renewable energy generation will be built where Oregon workers would get the jobs associated with the construction and operation of those facilities."[7]

As noted above, to the extent the Commission is searching for "additional relevance" of Section 2, the Commission should utilize the Legislature's policy statements to confirm that, for purposes of evaluating CEPs, it is in the public interest that (1) electricity used to serve Oregon loads "be generated, to the maximum extent practicable, in a manner that provides additional direct benefits to communities in this state in the form of creating and sustaining meaningful living wage jobs, promoting workforce equity and increasing energy security and resiliency"; and (2) that

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[6] "In the proper sequence of analyzing the legality of action taken by officials under delegated authority, the first question is whether the action fell within the reach of their authority, the question which…is described as jurisdiction. If that is not in issue, …the question is whether the substance of the action, though within the scope of the agency's or official's general authority, departed from a legal standard expressed or implied in the particular law being administered, or contravened some other applicable statute. These steps are designed to assure that the challenged action…was authorized by the state's…politically accountable policy makers." *Qwest Corp.*, 205 Or App at 378-79 (quoting *Planned Parenthood Ass'n v. Dept. of Human Res.*, 297 Or 562, 565, 687 P2d 785 (1984)).

[7] House Committee on Revenue at 15:46 (May 13, 2021) https://olis.oregonlegislature.gov/liz/mediaplayer?clientID=4879615486&ev entID=2021051192 &startStreamAt=946&stopStreamAt=970; *see also* NewSun Motion for Clarification at 8-9, Attachment A (Jun. 28, 2023).

implementation activities "be done in a manner that minimizes burdens on environmental justice communities." Such a statement would neither require the Commission to "delineate specific policies not articulated in the statutes" nor "alter [the Commission's] interpretation of clear language used in the operative sections of the law."

Regarding the Section 2 policies, the Commission states that "HB 2021 does not assert a requirement or preference for in-state resources." (Scoping Order at 5) While no party seems to have suggested that Section 2 creates such a "requirement," it is undeniable that Section 2 firmly establishes the Legislature's desire that, "to the maximum extent practicable," electricity be generated "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." And yet, even in PGE's 2021 all-resource request for proposals ("RFP"), the Commission declined to give any weight to the Section 2 preference toward projects that provide such "additional direct benefits to communities in this state."[8] The Commission could have, for example, required PGE to modify its RFP to require respondents to show how their proposals meet, or attempt to meet, the Section 2 goals, and give even nominal weight toward responses that meet those goals. Instead, it deferred consideration of Section 2's policies to this docket. It should now use this opportunity to show how it will give weight toward those policies.

5. The Commission should require a regular, enforceable progress by utilities to ensure the Legislature's decarbonization goals are timely met. (Issue I(a)(4))

The Commission should require utilities to actively demonstrate regular, enforceable progress toward the Legislature's GHG emissions goals. Allowing utilities to defer compliance

[8] Order No. 21-460 at 9-10.

until the deadline will ensure failure and maximize costs and burdens on both ratepayers and the public at-large, including environmental justice communities. The Commission should not acknowledge or approve any IRP, CEP, or RFP submitted by a utility unless the utility affirmatively shows it is on track to acquire resources in the near-term to ensure compliance in the long-term. Further, if an IRP order is being used for compliance under the Act, that order must be a final order subject to judicial review. If the Commission's position is that an IRP order, even if used for compliance under the Act, is not subject to judicial review, then the Commission must establish a separate compliance filing docket where orders are final and subject to judicial review.

6. The Commission should offer guidance on cost caps for electric utilities. (Issue I(b)(1))

In order to avoid *post hoc* debates over whether a utility's investments count toward the cost cap under the Act, the Commission should offer clear guidance based on anticipated scenarios. This would not require further factual development and would efficiently guide utilities in their resource planning efforts over the coming years. In the development of this guidance, NewSun requests that the Commission adopt the following principles:

- For determining whether an "investment or cost" contributes to compliance, qualifying costs should be limited to those consistent with the State's policy as articulated in Section 2 of the Act. At the very least, greater weight should be given to costs incurred for developing or procuring resources consistent with the Section 2 policies.
- Costs should be levelized over time and not deferred for a future lump-sum purchase that would likely exceed the cap.

- Utilities should be prohibited from including ordinary course costs (i.e., costs that the utility would have incurred even without the Act's compliance requirements) in their in cost-cap calculations.
- Costs applied to the cost-cap should take into account (i.e., deduct) savings realized by the utility.

IV. 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 24th day of July, 2023.

Respectfully submitted,

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