**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

**UM 2273**

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| In the Matter of<br>PUBLIC UTILITY COMMISSION<br>OF OREGON,<br><br>Investigation Into House Bill 2021<br>Implementation Issues. | REPLY BRIEF OF THE<br>GREEN ENERGY INSTITUTE AT<br>LEWIS & CLARK LAW SCHOOL |

## I. Introduction

The parties' opening briefs confirm that the path GEI recommended in our opening brief is the best option for the Commission. Requiring retirement of RECs associated with the generation attributed to a utility under HB 2021 and delivered to retail electricity consumers (hereinafter, associated RECs) is the option most consistent with the load-based language of HB 2021, the legislative history of the law (should it be helpful to consult), existing and future climate policy, and consumer protection laws. Other parties would have the Commission ignore the agency's substantial and expansive authority, pretend property rights and environmental marketing laws do not exist, fail to apprehend the newly consequential effect of DEQ's emissions reporting, and potentially undermine other Oregon laws like the state's Renewable Portfolio Standard (RPS). Regardless of which GHG emissions accounting framework–load- or generation-based–that the Commission determines HB 2021 to require, it must not mix the two.

## II. Argument

The Commission has well-established existing authority, as well as discretionary powers provided through HB 2021, to address and solve the very limited issue presented here.

### A. The Question is Narrow but Important: How Should the Commission Treat RECs Generated from HB 2021 Renewable Resources After the RPS is Satisfied?

The question before the Commission is whether to require retirement of RECs generated from renewable resources in compliance with HB 2021 *not* needed by Oregon's utilities to comply with Oregon's RPS. Although the question is limited, the issue is critical to the integrity of the decarbonization path established by HB 2021. One thing the Commission must remember, however, is that it must determine whether HB 2021 is a load-based or generation-based program. It must not mix elements from these accounting frameworks.

To resolve this narrow question, the Commission should exercise its discretion (supported by the language of the law reflecting HB 2021 is a load-based program) to require retirement of associated RECs. Such an interpretation is consistent with the existing legal and regulatory reality. Specifically, HB 2021's compliance reporting to the Department of Environmental Quality (DEQ) under a load-based program would remain intact.[1] Oregon's RPS and definitions of RECs would remain unchanged, too.[2] A load-based HB 2021 would continue to require reductions in emissions from emitting sources; *all* the parties agree that the law does not permit utilities to pair emitting sources with an unbundled REC to achieve emissions reductions.[3] Oregon's utilities must reduce emissions from emitting sources and add non-emitting sources to

[1] *See* 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 (July 24, 2025), https://edocs.puc.state.or.us/efdocs/HBC/um2273hbc15223.pdf (only a generation-based program requires changes to DEQ's reporting program) [hereinafter GEI's Opening Brief].

[2] *Contra* UM 2273, In the Matter of Public Utility Commission of Oregon, Investigation Into House Bill 2021 Implementation Issues, Opening Brief of the Oregon Citizens' Utility Board 16 (July 25, 2023), https://edocs.puc.state.or.us/efdocs/HBC/um2273hbc15749.pdf (arguing the Oregon Legislature "did not intend to alter RPS requirements with HB 2021"); *Id.* at 8 ("A REC-based 100% clean program would also require revisiting the definition of renewable energy to prevent a huge overbuilding of the Northwest's energy grid due to its vast hydro resources (and some nuclear) that do not count towards the RPS.").

[3] *Contra Id.* at 7 ("Fossil fuel generation could be allowed as long as the generation was offset with a REC.").

meet customer load to comply with HB 2021's clean energy targets. The utilities' emission reports to DEQ would remain a "compliance" component. Just as before, Oregon's utilities would generate RECs at their facilities, as applicable, or procure RECs through their Power Purchase Agreements. The utilities would bank and retire RECs conforming with state law for the RPS.[4] Finally, the Commission must ensure that the same renewable energy generation, and its non-power attributes, are not sold to different parties by requiring the retirement of associated RECs.

The Commission's decision is critical to the integrity of HB 2021 and upholding climate policy grounded in "a near universal practice that helps ensure that … zero emission power is credible."[5] Retirement of associated RECs would substantiate clean energy delivery and use claims, and prevent double counting of the non-power attributes for renewable energy, conforming with long-established energy norms and federal regulations for renewable energy claims.[6] A determination that HB 2021 is load based aligns with the Oregon legislature's intent and the overarching goal of HB 2021: to serve Oregon electricity customers with 100% clean energy. The Commission can only achieve this goal if it requires the retirement of RECs generated in compliance with HB 2021 *not* used for Oregon's RPS.

The Commission may be tempted to combine elements of a load-based program and a generation-based program. A load-based program requires a tracking mechanism for renewable resources, most commonly a REC, to account for the environmental attributes of renewable energy and provide renewable energy claims, whereas a generation-based program does not. However, it would be improper for the Commission to mix elements of the two accounting frameworks. For example, under a generation-based program, it could be problematic to place "perpetual holds" or similar restrictions on associated RECs to prevent double counting; in such a program, there is no double counting risk associated with sales of the RECs as RECs are not used as a tracking mechanism. Mixing elements of the two frameworks could result in problematic renewable energy delivery and use claims and associated risks to customers.

### B. The Commission Has the Authority to Retire Associated RECs under HB 2021

Any assertion that the Commission does not have the authority to require utilities to retire RECs used for HB 2021 compliance[7] is simply unsupported. Aside from the analysis we offered in our opening brief, requiring retirement of associated RECs is well within the authority of the Commission, which may use its "powers" to "protect . . . customers, and the public generally" from "unreasonable practices," given the risks to the utilities and ratepayers from double counting.[8]

In addition, as Northwest Energy Coalition (NWEC) and Renewable Northwest (RNW) pointed out in their opening brief, HB 2021 gives the Commission a legislative mandate beyond

[4] Or. Rev. Stat. § 469A.140.
[5] UM 2273, Matt Clouse, EPA Green Power Partnership, Interested Party Comment 4 (July 24, 2023), https://edocs.puc.state.or.us/efdocs/HAC/um2273hac9745.pdf [hereinafter EPA's Comments].
[6] *Id.* at 2-3.
[7] CUB's Opening Brief, *supra* note 2, at 10.
[8] Or. Rev. Stat. §756.040 (the Commission "shall" use its "powers" to "protect … customers, and the public generally" from "unreasonable . . . practices.").

determining whether the utilities' CEPs meet the clean energy targets.[9] Considering that the Commission must ensure an electric company "is taking actions as soon as practicable to facilitate rapid reductions"[10] of GHG emissions–independent from assuring compliance with the clean energy targets–as well as the separate and additional focus on GHG emissions beyond the clean energy targets,[11] the Commission is authorized to address issues relating to emissions beyond the reports provided to DEQ.

We recognize that HB 2021 does not contain a clause saying, "RECs not used for RPS compliance must be retired." However, the existing legal reality of RECs as property rights,[12] combined with the fact that HB 2021 makes emissions reporting newly consequential, as we discuss in Part II.D, means that the Commission must require associated RECs to be retired before it may treat solar, wind, and other REC-generating renewable power as non-emitting.[13] Notably, CUB does not specifically address the narrow issue before the Commission: whether associated RECs *not* used for the RPS should be retired. We welcome the opportunity to explore with the Commission and CUB the solution we present here.

Finally, UM 2273 provides the proper forum for the Commission to investigate unresolved legal issues in order to adopt rules pursuant to HB 2021.[14] The Commission has the authority to work through these legal issues, including whether associated RECs must be retired to prevent double counting and protect utilities and customers from unnecessary risks.

### C. Legislative History Continues to Support a Load-Based Program.

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."[15] "[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."[16] In an examination of a statute's context, the "most important type of context to consider . . . is other parts of the same statute," also known as the "whole act rule."[17] Other parts of the same statute include statements of statutory

[9] UM 2273, In the Matter of Public Utility Commission of Oregon, Investigation Into House Bill 2021 Implementation Issues, Opening Brief of NW Energy Coalition & Renewable Northwest 5-6 (July 24, 2023), https://edocs.puc.state.or.us/efdocs/HBC/um2273hbc152834.pdf.
[10] Or. Rev. Stat. § 469A.415(6).
[11] *See* Or. Rev. Stat. § 469A.405(1); Or. Rev. Stat. § 469A.415(6); Or. Rev. Stat. § 469A.420(2).
[12] GEI's Opening Brief, *supra* note 1, at 6.
[13] *Id.* at 3.
[14] Or. Rev. Stat. § 469A.465.
[15] State v. Gains, 346 Or 160, 206 P3d 1042, 171-72, 1050 (2009).
[16] *Id.* at 171.
[17] Honorable Jack L. Landau, Oregon Statutory Construction, 97 Or. L. Rev. 583, 639 (2019), https://scholarsbank.uoregon.edu/xmlui/handle/1794/24712 (describing the "whole act rule" as "one of the oldest statutory construction rules."); Unger v. Rosenblum, 362 Or 210, 221, 407 P3d 817, 823 (2017) ("[W]e consider all relevant statutes together, so that they may be interpreted as a coherent, workable whole."); Wetherell v. Douglas County, 342 Or 666, 160 P3d 614, 678, 620 (2007) ("This court does not look at one subsection of a statute in a vacuum; rather, we construe each part together with the other parts in an attempt to produce a harmonious whole." (internal quotation marks omitted).

policy and legislative findings.[18] As such, the Commission is "obligated to take a statute as [it] find[s] it and give effect to all of it, if possible."[19]

Second, regardless of ambiguity, the Commission may "consult" pertinent legislative history.[20] Here, "[a]nalysis of the context of a statute may include prior versions of the statute."[21] Context can include other statutes on "the same or a related subject."[22] On occasion, statutory context includes "the legislative history of … related statutes," but this context includes only "related statutes that the legislature actually enacted into law."[23] Moreover, "[a] statute's 'context' doesn't include the legislative history of related statutes that the legislature decided *not* to enact."[24]

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."[25] One general maxim Oregon courts frequently employ is the Rule Against Surplusage, in which all parts of a statute "mean something and serve[] the larger purpose that animates the statute as a whole."[26] Another maxim is the Unreasonable Results Cannon, which "is based on the assumption that the legislature intends its enactments to accomplish reasonable objectives and do not lead to absurd results."[27]

1. *The Joint Utilities and CUB fail to address the meaning of key load-based provisions of HB 2021, but EPA acknowledges these provisions as central to the law.*

The Commission must reconcile the load-based text within HB 2021 since "other parts of the same statute" is the "most important type of context to consider."[28] A statute should be viewed as a whole, "not just particular words in a vacuum."[29]

Many provisions in HB 2021 support a decision that HB 2021 is a load-based program, requiring the limited retirement of associated RECs not used for RPS compliance. First, ORS 469A.405 (HB 2021 § 2), which sets out the policy for HB 2021, states "[t]hat retail electricity providers rely on non-emitting electricity in accordance with the clean energy targets set forth in section 3

[18] Providence Health System Oregon v. Walker, 252 Or App 489, 289 P3d 256 (2012) ("Context includes statements of statutory policy.").
[19] Wyers v. American Medical Response Northwest 360 Or 211, 377 P3d 570, 221, 576 (2016).
[20] State v. Gains, 346 Or 160, 206 P3d 1042, 172, 1050 (2009).
[21] State v. Ziska, 355 Or 799, 334 P3d 964, 806, 967-68 (2014) ("Analysis of the context of a statute may include prior versions of the statute."); Landau, *supra* note 17, at 645.
[22] State v. Klein, 352 Or 302, 283 P3d 350, 309,354 (2012) (statute's context includes "related statutes"); State v. Carr, 319 Or 408, 877 P2d 1192, 411-12, 1194 (1994) ("Context includes other related statutes.").
[23] Landau, *supra* note 17, at 643.
[24] Landau, *supra* note 17, at 644 (emphasis original); *see also* State v. Ofodrinwa, 353 Or 507, 300 P3d 154, 522 n.15, 162 n.15 ("[T]he failure to enact legislation, . . . does not provide persuasive evidence of . . . intent.").
[25] State v. Gains, 346 Or 160, 206 P3d 1042, 171-72, 1050 (2009).
[26] Landau, *supra* note 17, at 665; *see also* Force v. Dep't of Revenue, 350 Or 179, 190, 252 P3d 306, 312 (2011) ("Statutory provisions, however, must be construed, if possible, in a manner that 'will give effect to all' of them.") (internal quotation marks omitted); Or. Rev. Stat. § 174.010 ("[w]here there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all.").
[27] Landau, *supra* note 17, at 712.
[28] Landau, *supra* note 17, at 639 (describing the "whole act rule" as "one of the oldest statutory construction rules."); *see* cases cited *supra* note 17.
[29] Landau, *supra* note 17, at 665; *see also* cases and statute cited *supra* note 26.

of this 2021 Act and eliminate greenhouse gas emissions *associated with serving Oregon retail electricity consumers by 2040*." As discussed in GEI's Opening Brief, this provision provides context, supporting a load-based program. EPA's Green Power Partnership ("EPA") highlights this section as critical to understanding HB 2021, explaining:

> A load-based policy that seeks to deliver emissions free electricity to Oregon electricity consumers would *best align* with other states and load-based policies by requiring the retirement of [RECs] for generation used to meet HB 2021. *Adoption of this near universal practice* helps ensure that the intent of HB 2021 policy to deliver zero emissions power is credible and ensures that other entities or consumers cannot double-count or double-claim the attributes of power claimed to be delivered under HB 2021.[30]

Based on this explanation, EPA's comments also convey that if HB 2021 is determined to be a generation-based program, Oregon will be an *outlier* and *misaligned* with other states' climate policies. And double counting and double claiming of non-power attributes of renewable energy could (or will) occur under the program. The Commission should carefully consider the EPA's assessment of HB 2021. As EPA works with participants across the country, it is familiar with a wide variety of regulations that reduce greenhouse gas emissions and can provide an expert and clear-eyed perspective on the decision before the Commission.

Second, although the utilities mention ORS 469A.400 (HB 2021 Section 1) in their opening brief, the utilities omit the text that supports a load-based program.[31] ORS 469A.400 establishes that the "Baseline emissions level" is based on "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." CUB does not address this provision.

Finally, neither the Joint Utilities nor CUB speak to the "clean energy standards" in ORS 469A.410 (HB 2021 Section 3), the "clean energy plan" in ORS 469A.415 (HB 2021 Section 4), the Community Benefits and Impacts Advisory Group established by ORS 469A.425 (HB 2021 Section 6), or that "additional emissions" may be permitted to "meet load" under ORS 469A.435 (HB 2021 Section 8). The Commission must review all parts of a statute to "mean something and serve[] the larger purpose that animates the statute as a whole," including these provisions in its statutory interpretation of HB 2021.[32]

2. *Some of the "legislative history" offered by CUB falls outside Oregon's statutory interpretation framework, and most is irrelevant to the question presented here.*

The Commission must exercise caution when considering CUB's statements regarding negotiations around the proposed cap and trade legislation in 2019 and 2020. Under Oregon's statutory interpretation framework, HB 2021's "context" does not "include the legislative history of related statutes that the legislature decided *not* to enact."[33] Because the 2019 and 2020 cap-

[30] EPA Comments, *supra* note 5, at 5.
[31] UM 2273, In the Matter of Public Utility Commission of Oregon, Investigation Into House Bill 2021 Implementation issues, Portland General Electric Company and PacifiCorp d/b/a Pacific Power Joint Phase 1 Opening Brief 1 (July 24, 2023), https://edocs.puc.state.or.us/efdocs/HBC/um2273hbc154536.pdf [hereinafter Joint Utilities' Opening Brief].
[32] Landau, *supra* note 17, at 665; *see* cases and statute cited *supra* note 26.
[33] Landau, *supra* note 17, at 644 (emphasis original); *see* cases cites *supra* note 24.

and-trade negotiations failed, those negotiations are not "context" under Oregon's statutory interpretation framework. However, the Commission may rely on prior versions of HB 2021 to inform its understanding of the legislative intent, as discussed in Part II.C.3.

CUB argues that HB 2021 was "designed to count emissions, and not be based on REC retirement."[34] We respectfully suggest that this characterization is unhelpful. As the Center for Resource Solutions explained in its comments, both load-based and generation-based programs account for emissions to the atmosphere.[35] Our position is that HB 2021 describes a load-based program, which would require retirement of RECs in addition to emissions reporting to DEQ. CUB's discussion of an "emissions-based" program may be intended to describe a compliance component of a load-based program, which could result in an outcome consistent with our interpretation of the law.

CUB refers to testimony and statements made during the bill's adoption to support its unhelpful characterization of HB 2021 as an "emissions-based" program. First, chief bill sponsor Representative Marsh conveyed the "bill [a]s technology neutral."[36] Neither GEI nor other stakeholders are requesting the Commission require all non-emitting generation resources to produce RECs. Second, comparing HB 2021 with the proposed bill that sought to expand the state's RPS during the 2021 legislative session is unhelpful.[37] Any testimony offered by "opponents of the bill" should be considered in context.[38] In any event, the decision before the Commission is not to transform HB 2021 into an expanded RPS; rather, it is to retire associated RECs not used for RPS compliance to avoid double counting. Further, as explained above, a load-based program can include an emission reporting component. Third, CUB highlights that NWEC used the phrase "emissions" in its testimony, and RNW agreed.[39] GEI agrees that emissions reporting is the primary compliance component of HB 2021. CUB also points to statements made by RNW, which RNW explains in its opening brief as statements related to "tracking" and not "accounting."[40] As such, the legislative history offered by CUB is unpersuasive on the question GEI seeks an answer to here.

GEI agrees with CUB that a *focus* of HB 2021 is on reducing emissions from fossil fuel generation *delivered to customer load*, especially since HB 2021 supports the utilities meeting their RPS requirements first. However, a *secondary* requirement, or complementary aspect, of HB 2021 is to ensure the utility's DEQ reports accurately reflect the zero-emissions attributes of renewable energy sources that produce RECs, which are now newly consequential in light of the clean electricity mandates in the law. Even the utilities' testimony to the legislature supports a conclusion that HB 2021 is a load-based program; the utilities referred to GHG emission

[34] CUB's Opening Brief, *supra* note 2, at 14.
[35] UM 2273, In the Matter of Public Utility Commission of Oregon, Investigation Into House Bill 2021, Center for Resource Solutions' Opening Comments 1-2 (July 24, 2023), https://edocs.puc.state.or.us/efdocs/HAC/um2273hac1343.pdf.
[36] CUB's Opening Brief, *supra* note 2, at 14.
[37] *See, e.g.,* Renewable Portfolio Standards, H.B. 2021-3 (proposed amendment LC 3683) (March 16, 2021), https://olis.oregonlegislature.gov/liz/2021R1/Downloads/ProposedAmendment/18863.
[38] CUB's Opening Brief, *supra* note 2, at 15.
[39] *Id.*
[40] NW Energy Coalition & Renewable Northwest Opening Brief, *supra* note 9, at 7-8.

reductions from "*from customer power*," which is a load-based program requirement, not a generation-based program component.[41]

Ultimately, CUB's description of the legislative history does not address the narrow issue before the Commission: the retirement of associated RECs *not* needed for compliance with Oregon's RPS.

*3. Legislative history reveals that the Oregon State Legislature did not support double counting.*

An examination of the prior versions of HB 2021 reveals the Legislature's distaste for double counting. During the legislative session, parties worked through prior versions of HB 2021. In version HB-2021-1 3/7/21, Section 6 stated:

> SECTION 6. Treatment of renewable energy sources. For the purposes of determining compliance with the clean energy targets set forth in section 3 (2) of this 2021 Act, when determining the annual greenhouse gas emissions associated with the electricity sold to retail electricity consumers by a retail electricity provider as reported under ORS 468A.280, or rules adopted pursuant thereto, electricity that is generated from a renewable energy source, *regardless of the disposition of the renewable energy certificate associated with the electricity,* shall be considered to have the emissions attributes of the underlying renewable energy source.[42]

In other words, if the legislature had enacted this version of Section 6, the underlying renewable energy sources would have retained a zero-emissions attribute *regardless of whether associated RECs were procured or retired*. Enactment of this provision would have given the utilities legislative permission to double-count the non-power attributes of renewable energy generation. It also would have run afoul of a well-recognized and long-understood expectation that a REC represents the non-power attributes of renewable energy, including the zero-emissions attribute. As EPA explains, "RECs play an important role for electricity suppliers, state policymakers, and consumers who seek to account for the energy and emissions associated with purchased electricity."[43]

Fortunately, the legislature did not enact HB 2021 with this language. Rather, the legislature removed this problematic provision in early drafting, confirming that the legislature did not wish to permit the utilities to treat RECs in a way that would lead to double counting.[44]

**D. The Joint Utilities Discredit the Commission's Role in Acknowledging Clean Energy Plans, and their Marketing Could Contradict their Legal Conclusions.**

The Joint Utilities fail to acknowledge that HB 2021 was a game changer. In their discussion of HB 2021 Section 7, which states, "electricity shall have the emission attributes of the underlying

[41] *See* CUB's Opening Brief, *supra* note 2, at 14.
[42] Clean Energy for All Act, H.B. 2021-1 (proposed amendment 3-17-21) (2021), https://olis.oregonlegislature.gov/liz/2021R1/Downloads/ProposedAmendment/19599 (emphasis added).
[43] EPA Comments, *supra* note 5, at 2.
[44] Clean Energy for All Act, H.B. 2021-3 (proposed amendment 3-17-21) (2021), https://olis.oregonlegislature.gov/liz/2021R1/Downloads/ProposedAmendment/18863.

generating resource,"[45] the utilities explain that the "statement is consistent with how investor-owned utilities report . . . [GHG] emissions to [DEQ] under ORS 468A.280."[46] However, before HB 2021, DEQ's reporting methodology was used only to track *air pollution*, not to comply with an ambitious decarbonization law to provide 100% clean energy for Oregon retail electricity consumers. HB 2021 brought DEQ's reporting methodology under a *binding* clean electricity compliance regime, and, as such, the utilities' reporting serves a different purpose than before. As EPA points out, "Oregon is part of a larger market that has developed based on certain norms and practices related to [RECs] and their use under regulatory and voluntary policies related to power generation, delivery, and consumption."[47] As such, the Commission must not view DEQ's rules and the utilities' emissions reporting in a vacuum.

Indeed, the Joint Utilities dilute the Commission's responsibility and authority under ORS 469A.420(2) (HB 2021 Section 5) to evaluate the utilities' CEPs. ORS 469A.420(2) states that the Commission "shall acknowledge the clean energy plan if [it] finds the plan to be in the public interest and consistent with clean energy targets." The Commission must also consider several criteria in making its determination.[48] The utilities depict the Commission as only responsible for "investigat[ing] how utilities will plan and invest . . . to meet HB 2021 targets" and fail to mention that the plans must be in the public interest and meet the associated criteria.[49] In evaluating whether the plan is in the public interest, the Commission must consider whether there are "any reduction[s] of greenhouse gas emissions." It will be hard for the Commission to acknowledge CEPs knowing associated RECs are sold to third parties (resulting in null power) and when ODOE's reports demonstrate double counting.[50] Finally, it is within the Commission's discretion to consider "[a]ny other relevant factors," such as the retirement of associated RECs *not* used for RPS compliance and whether the utilities can substantiate that the electricity they delivered to Oregon customers was "clean."[51]

While GEI appreciates the utilities acknowledging that stakeholders have concerns about double counting, the utilities continue disregarding the potential risks to customers.[52] As EPA points out, a load-based program "ensures that other entities or consumers cannot double-count or double-claim the attributes of power claimed to be delivered under HB 2021."[53] GEI and allied stakeholders are not overreacting to the potential for double counting of non-power attributes of renewable energy sources that produce RECs under Oregon law; EPA sees this problem, too.

As such, concerns for double counting are not "misplaced or outside the scope of HB 2021."[54] The Commission may only acknowledge a CEP that is in the "public interest." Acknowledging a CEP while cognizant of an ODOE report detailing the amount of double counting occurring is

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[45] Or. Rev. Stat. § 469A.430.
[46] Joint Utilities' Opening Brief, *supra* note 31, at 1.
[47] EPA Comments, *supra* note 5 at 4.
[48] Or. Rev. Stat. § 469A.420(2)(a)-(f).
[49] Joint Utilities Opening Brief, *supra* note 31, at 2.
[50] UM 2273, Amy Schlusser, Oregon Dep't of Energy, RE: Oregon Department of Energy Interested Person Comments 5 (July 24), https://edocs.puc.state.or.us/efdocs/HAC/um2273hac17425.pdf (discussing ODOE's report demonstrating double counting) [hereinafter ODOE Comments].
[51] *See* GEI's Opening Brief, *supra* note 1, Part II.C.
[52] *See* GEI's Opening Brief, *supra* note 1, Part II.B.4 (describing unintentional consumption of RECs through reporting requirements).
[53] EPA Comments, *supra* note 5, at 4.
[54] Joint Utilities' Opening Brief, *supra* note 31, at 2.

antithetical to HB 2021's goals and cannot be reconciled with being in the public interest. Only the retirement of associated RECs *not* used for RPS compliance avoids double counting.

The utilities assert that "DEQ's methodology for emissions accounting does not result in any claim to the underlying renewable energy: there are no renewable resources that are 'used for compliance' with HB 2021 under the law."[55] However, this argument is undermined by the utilities' actions and plans. As EPA pointed out, "[i]f electricity providers that serve Oregon electricity consumers seek to deliver renewable or zero emissions power because of a regulatory policy, it may be viewed as deceptive to consumers if the power they receive is not otherwise substantiated with RECs to describe that power."[56]

Setting aside renewable energy claims under the state's RPS, the utilities' CEPs and related media appear to encroach on renewable energy claims by implying through words and images that they will meet HB 2021's clean energy targets with solar and wind resources. For example, Pacific Power's cover page of its 2023 CEP includes images of solar panels and wind turbines, implying that the plan will bring renewable resources in some way related to its plan to meet HB 2021's "clean energy targets."[57] Pacific Power's press release was of a similar ilk, depicting a wind facility at the foot of Mt. Hood, a recognizable image for many Oregonians.[58] Likewise, PGE's CEP website announcement has images of wind turbines and solar arrays, and notes, "[n]ew utility scale renewable projects like wind and solar installations, both in-state and out-of-state, and the necessary transmission to bring it to local customers."[59] Under federal guidance, it is deceptive to *imply* the use of renewable energy when utilities have sold the associated RECs.[60] HB 2021 cannot and did not get around this federal guidance by using the term "non-emitting." If some non-emitting generation includes renewable sources that generated associated RECs under Oregon law, it would be deceptive to make or imply in public statements that retail electricity customers are receiving renewable energy.[61]

The utilities hang their entire statutory interpretation of HB 2021 on ORS 469A.410(2), which 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." However, as discussed in GEI's Opening Brief, this provision was intended to address concerns about tracking electrons on the power grid and does not address the treatment of RECs.[62]

Finally, GEI agrees that "[d]ifferent regulatory requirements can require different means of compliance,"[63] but that does not mean that it is appropriate for a utility to report non-emitting generation to DEQ that produces a REC while at the same time selling the legal right to that non-emitting generation to a third-party buyer.

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[55] *Id.* at 3.
[56] EPA Comments, *supra* note 5, at 4.
[57] LC 82, Pacific Power, 2023 Clean Energy Plan (May 31, 2023), https://edocs.puc.state.or.us/efdocs/HAS/lc82has145438.pdf.
[58] *Pacific Power releases inaugural plan to achieve net-zero emissions in Oregon by 2040*, Pacific Power (May 31, 2023), https://www.pacificpower.net/about/newsroom/news-releases/oregon-clean-energy-plan.html.
[59] *Portland General Electric Files Inaugural Clean Energy Plan*, PGE (March 31, 2023), https://portlandgeneral.com/news/2023-03-31-portland-general-electric-files-inaugural-clean-energy-plan
[60] GEI's Opening Brief, *supra* note 1, at 19.
[61] *Id.* at 8.
[62] *Id.* at 10.
[63] Joint Utilities' Opening Brief, *supra* note 31, at 3.

### E. The Oregon Department of Energy's Comments Recognize the Potential for Double Counting.

We appreciate the Oregon Department of Energy (ODOE) providing context about the interplay between Oregon's RPS and HB 2021.[64] As ODOE points out, "if a utility procures a greater amount of RPS qualifying generation to demonstrate compliance with HB 2021 than it needs to achieve compliance with its RPS, and the utility subsequently chooses to sell unbundled RECs to another entity, both the utility and the REC purchaser could claim the non-energy attributes of the electricity."[65] ODOE identifies this as "undermin[ing] the purpose and spirit of the RPS."[66] GEI agrees and adds that double counting would also undermine the purpose and spirit of HB 2021.

We think it is important to address ODOE's uncited assertion that "RECs are not expressly designed to capture the emissions attributes of the underlying electricity source and do not represent the delivery of zero-emissions electricity onto the grid."[67] Energy experts[68] and EPA's comments in this docket counter ODOE's opinion.[69] Moreover, ODOE cites an exception to the rule to make its point, referring to the identical treatment of RECs created from wind and solar as those produced from municipal solid waste.[70] But what ODOE fails to grapple with is that RECs are creatures of state law, which means they can and are subject to varying definitions. Regardless of Oregon's decision to create RECs for municipal solid waste combustion, RECs widely represent the non-power attributes of renewable energy sources like wind and solar.[71] In fact, ODOE's own explanation recognizes that RECs *do* represent the emissions attributes of the underlying electricity source; after all, it acknowledges the potential for double counting, which can only happen when two parties claim the same zero-emissions attribute. Accordingly, once the Commission requires the retirement of associated RECs *not* used for RPS compliance, ODOE's assertion about the necessity for "statutory changes" is rendered moot.[72]

As EPA explains, numerous Oregon Green Power Partnership participants use RECs to substantiate zero-emissions claims.[73] In fact, according to the EPA, "RECs are being considered under several proposed Federal rules based on norms and practices related to their widespread application and use to substantiate generated, delivered, and consumed power."[74] Further, a greater number of organizations and regulatory bodies are relying on RECs to substantiate

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[64] ODOE Comments, *supra* note 50.
[65] *Id.* at 1.
[66] *Id.*
[67] *Id.* at 3.
[68] *See generally* The Legal Basis for Renewable Energy Certificates, Center for Resource Solutions (2023), https://resource-solutions.org/wp-content/uploads/2015/07/The-Legal-Basis-for-RECs.pdf; Jeremy D. Weinstein, What Are Renewable Energy Certificates? 41 Futures & Derivatives Law Report (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.
[69] EPA Comments, *supra* note 5, at 2.
[70] ODOE Comments, *supra* note 50, at 3 (describing for "purposes of compliance with Oregon's RPS, a bundled REC for wind and solar power (which has zero emissions) is identical to a bundled REC for electricity produced from municipal solid waste combustion (which does not have zero emissions.).
[71] The Legal Basis for Renewable Energy Certificates, *supra* note 68, at 3.
[72] *Contra* ODOE Comments, *supra* note 50, at 4.
[73] EPA Comments, *supra* note 5, at 3.
[74] *Id.* at 3.

renewable energy claims around the world.[75] European trade policies will likely require RECs to substantiate renewable energy claims related to electricity used to manufacture products.[76]

ODOE correctly explains the concept of null power but states that, under HB 2021, a "utility would still be able to effectively claim the unbundled electricity—the 'null power'—as zero-emissions."[77] GEI disagrees with this assertion. Energy experts define null power as "any electricity produced by a renewable energy electric generating facility from which a [REC] has been unbundled and sold separately."[78] Changing the definition of null power ignores the "norms and practices" related to RECs and is equivalent to facilitating double counting by state rule.[79] Failing to account for null power will result in an over-representation of renewable energy and an under-representation of emitting energy on the grid and does not align with the purpose of HB 2021.

According to ODOE, "DEQ does not treat null power as unspecified power, because doing so would over-estimate actual GHG emissions in Oregon."[80] If that is the case, the easiest way to address this inconsistency is to determine that HB 2021 is a load-based program that requires the retirement of associated RECs not used for RPS compliance. Only under a generation-based program is there a need to treat null power as unspecified power to prevent double counting.

ODOE recognizes that by disregarding the creation of null power, there is the potential for double counting non-power attributes of renewable energy, stating, "[t]he differing treatment of null power under the RPS and HB 2021 could create a potential opening to create what some might consider 'double-counting' the environmental attributes of renewable electricity that contributes to compliance with the state's clean energy standards."[81]

As we read ODOE's comments, the agency provides an example to illustrate the potential for double counting under HB 2021 and Oregon's RPS by Oregon's two utilities: one utility sells unbundled RECs generated by a renewable energy resource to comply with HB 2021's clean energy targets and the second utility is the buyer of the same unbundled REC, which it uses it to comply with Oregon's RPS. Although the RPS program permits utilities to use up to 20% unbundled RECs to meet the requirement, this would constitute double counting of non-power attributes of renewable energy. Such transactions and reporting are possible under HB 2021 today, undermining the purpose and spirit of Oregon's RPS *and* HB 2021, and the Commission should not permit such actions.

Although the situation posed by ODOE may arise, it is less likely to occur than a similar scenario with an out-of-state third-party buyer. For example, an Oregon utility sells an unbundled REC to

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[75] *Id.* at 2.
[76] *Id.* at 2.
[77] ODOE Comments, *supra* note 50, at 4.
[78] 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; *Green Power Markets*, EPA.gov, https://www.epa.gov/green-power-markets/glossary#N (last accessed Aug. 20, 2023) (describing "Null Power" as "[t]he underlying power remaining when the environmental attributes associated with [RECs] have been stripped off and sold independent to the power.")
[79] EPA Comments, *supra* note 5, at 3.
[80] ODOE Comments, *supra* note 50, at 5.
[81] *Id.*

an out-of-state third party, conveying the legal rights to zero-emissions attributes.[82] The third-party pairs the unbundled REC with electricity generated from fossil fuels but can now claim that it uses renewable energy to power its facilities. This also constitutes double counting the non-power attributes of renewable energy.

To address the double counting issue under a generation-based program, GEI recommended that null power receive the unspecified market emissions factor established by DEQ.[83] We are not married to this specific emissions factor, but it appears reasonable. The unspecified emission factor of 961 lbs/MW h (0.428 MMT/MWh) was collaboratively developed by California energy regulators and other Western Climate Initiative jurisdictions and is "representative of a fairly clean natural gas plant."[84] Specifically:

> The unspecified power emission factor is calculated as a rolling three-year average of the marginal plants in the Western Interconnection, where marginal plants are defined as facilities producing at 60% of generating capacity or less. The emission factor is then calculated using Energy Information Administration (EIA) fuel and net generation data and CARB fuel specific emission factors.
>
> The resources assumed available for marginal dispatch are largely natural gas facilities. Baseload and renewable sources are excluded from the WCI market emission factor calculation. Baseload facilities are typically large capacity sources, such as coal, large hydro, and nuclear power, that generate electricity at costs lower than natural gas facilities. Less expensive coal, nuclear power, and hydroelectricity are assumed to be fully committed to meet utility baseload in the Western Interconnection. More expensive renewable energy is assumed to be fully contracted by electric utilities in order to meet Renewable Portfolio Standard (RPS) compliance targets.[85]

This insight shows that the unspecified emissions factor of 0.428 MTCO2e/MWh is a fair representation of emissions elsewhere within the Western Interconnection. Oregon adopted this emission factor through DEQ's Greenhouse Gas Reporting and Third-Party Verification 2019 rulemaking.[86]

ODOE's remarks conclude with a revelation. Not only will the Commission have access to evidence of double counting within its dockets, as we pointed out in GEI's Opening Brief,[87] but ODOE will produce a report that will track and report double counting activity through its electricity resource mix reporting process.[88] The Commission should find this result

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[82] GEI's Opening Brief, *supra* note 1, at 18-19.
[83] *Id.* at 16.
[84] James Bushnell, et al., *Downstream regulation of CO2 emissions in California's electricity sector*, 64 Energy Policy 313, 315 (2014), https://www.sciencedirect.com/science/article/pii/S0301421513008690; *contra* ODOE Comments, *supra* note 50, at 4 n.14 (describing "0.428 MTCO2/MWh . . . [as] equivalent to the emissions factor of a natural gas power plant ramping up.")
[85] James Bushnell, et al., *supra* note 84 at 315.
[86] *Greenhouse Gas Reporting and Third-Party Verification 2019*, DEQ, https://www.oregon.gov/deq/Regulations/rulemaking/Pages/rGHG2019.aspx (last accessed Aug. 21, 2023).
[87] GEI's Opening Brief, *supra* note 1, at 14.
[88] ODOE Comments, *supra* note 50, at 5.

unacceptable. GEI believes a report documenting double counting under a decarbonization law such as HB 2021, whether in Oregon or neighboring states, is nonsensical.

Should the Commission find that the legislature's intent remains unclear, it "may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty,"[89] including the Unreasonable Results Cannon. The Unreasonable Results Cannon assumes "that the legislature intends its enactments to accomplish reasonable objectives and do not lead to absurd results."[90] The legislature intended HB 2021 to "accomplish a reasonable objective:" to provide 100% clean electricity to Oregon electricity customers. The Commission can only achieve this objective by requiring the retirement of associated RECs *not* used for RPS compliance.[91] Given that no party has identified this specific issue in their legislative history, if the Commission fails to deliver this "reasonable objective," it would lead to an "absurd result[]:" a report of double counting of the non-power attributes of renewable energy under HB 2021.

### F. Policy Considerations Support HB 2021 as a Load-Based Program.

#### *1. Not requiring the retirement of associated RECs furthers unbundled REC usage.*

CUB's Opening Brief conveys a dislike for unbundled RECs paired with emitting generation to substantiate renewable energy claims.[92] Although permissible under federal guidance, many state load-based policies, such as Oregon's RPS, limit the use of unbundled RECs for policy reasons.[93] Under HB 2021, such pairing is not permissible either. If the Commission determines HB 2021 is a load-based program, the state will limit the availability of unbundled RECs on the market to substantiate renewable energy claims elsewhere. However, if HB 2021 is determined to be a generation-based program, the utilities could sell unbundled RECs on the market to third parties, such as large companies or other utilities, which would use the RECs to substantiate renewable energy claims.[94] From a policy perspective, a load-based HB 2021 supports bundled REC programs.

#### *2. The benefit of retirement outweighs any revenue from the sale of unbundled RECs.*

No party has claimed that the economic benefit from selling unbundled RECs outweighs the risks we have presented. If revenue from the sale of unbundled (and double counted) RECs is top of mind for the Commission, we offer three thoughts: (1) unbundled (and double counted) RECs will bring in little revenue;[95] (2) utilities will need to exercise caution in making

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[89] State v. Gains, 346 Or 160, 206 P3d 1042, 171-72, 1050 (2009).
[90] Landau, *supra* note 17, at 712.
[91] *See Id.*
[92] *See generally* CUB's Opening Brief, *supra* note 2.
[93] *See* Shannon Osaka & Hailey Haymond, *Why buying renewable energy doesn't mean what you think*, Wash. Post (June 21, 2023 at 6:30 am EDT), https://www.washingtonpost.com/climate-environment/2023/06/21/renewable-energy-credits-certificates-greenwashing/ (discussing some drawbacks of unbundled RECs).
[94] *See* 2022 California Renewables Portfolio Standards Annual Report, Ca. Pub. Util. Comm'n 13, 70 (2022), https://www.cpuc.ca.gov/-/media/cpuc-website/industries-and-topics/documents/energy/rps/2022-rps-annual-report-to-the-legislature.pdf (describing PacifiCorp as a multi-jurisdictional utility "exempt from the portfolio balance requirements" and allowed to use unbundled RECs to meet California's RPS).
[95] Unbundled REC pricing is about $1.50/MWh. *Unbundled Electricity and Renewable Energy Certificate*s, EPA, https://www.epa.gov/lmop/unbundle-electricity-and-renewable-energy-certificates#1foot (last accessed Aug. 15, 2023). Presumably, the price for a double-counted REC would be less.

renewable energy claims once the RPS is satisfied; and (3) retiring RECs so that customers can claim receipt of renewable energy offers more value to the customer than selling an unbundled (and double counted) REC. Finally, of course, should unbundled (and double counted) RECs be sold, the Commission must ensure that the utilities return any revenue to ratepayers.

*3. EPA indicates that Oregon businesses could experience unintended repercussions under a generation-based program.*

EPA points out that if the Commission decides that associated RECs *not* used for RPS compliance do not need to be retired under HB 2021, the Commission may unintentionally and negatively impact Oregon's corporations.[96] Moreover, EPA explains that a generation-based program would likely adversely impact Oregon Green Power Partnership participants, such that they would no longer qualify for its program.[97] The Commission should carefully consider the impact of its decision on thousands of Oregon electricity customers that participate or have chosen to be leaders in the clean energy transition.

## III. Conclusion

Neither the parties to this proceeding nor the Commission may ignore the reality that RECs exist and represent the zero-emissions nature of renewable energy. Arguments pointing to the absence of a specific legislative direction requiring the retirement of RECs ignore the numerous provisions demonstrating that HB 2021 sets up a load-based accounting system for GHG emissions. As a result, when renewable energy is used to reduce the utilities' emissions (as both utilities plan), and a REC is generated, it must be retired to avoid double counting. This is a fair reading of the statute, is consistent with the law's legislative history, and avoids harming customers, undermining Oregon's RPS, and imposing additional burdens on the Commission to ensure utility marketing efforts are consistent with federal law.

Sincerely,

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[96] EPA Comments, *supra* note 5, at 4.
[97] *Id.* at 5.