PACIFIC POWER
A DIVISION OF PACIFICORP

825 NE Multnomah Street, Suite 2000
Portland, Oregon 97232

July 24, 2023

***VIA ELECTRONIC FILING***

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

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

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

If you have questions about this filing, please contact Stephanie Meeks at (503) 813-5867.

Sincerely,

Matthew McVee
Vice President, Regulatory Policy and Operations

Enclosure

**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

**UM 2273**

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

## Table of Contents

# I. INTRODUCTION

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

The Joint Utilities continue to appreciate and support the Commission and Commission Staff's diligent efforts with House Bill (HB) 2021 related issues, and provide the following legal and policy briefing for the Commission's consideration. As discussed below: (1) renewable energy credits (RECs) are not relevant to HB 2021 compliance; (2) the law's public interest factors are adequately descriptive and no additional guidance is needed at this time; (3) HB 2021's policy statements provide helpful context, but do not create substantive requirements—especially not an in-state preference for siting non-emitting generation resources; (4) the Commission's obligation to ensure continual progress is limited to reviewing individual IRPs/CEPs, not separate progress reports or compliance filings; and (5) the Commission should use Phase II of the UM 2273 investigation to provide guidance on several discrete issues related to HB 2021's cost-cap.

# II. ARUGUMENT

## A. The Commission should conclude that RECs are not relevant to HB 2021.

The Joint Utilities agree with the Commission that RECs are not relevant to determine compliance with HB 2021's emissions reduction targets.

ORS 469A.430 states that, for the purposes of determining compliance with ORS 469A.400 to 469A.475, "electricity shall have the emission attributes of the underlying generating resource." This statement is consistent with how investor-owned utilities report, and have always reported, greenhouse gas (GHG) emissions to the Department of Environmental Quality (DEQ) under ORS 468A.280. Since 2009, GHG reporting to DEQ has been based on emissions associated with the megawatt-hours (MWh) of electricity generated or purchased to serve end users in Oregon—whether or not a utility retains or retires RECs.[2] This provides the

[1] *In re Commission HB 2021 Investigation*, Docket No. UM 2273, Order No. 23-194 (Jun. 5, 2023).
[2] *See* OAR 340-215-0120 (silent regarding RECs).

DEQ an accurate picture of actual emissions from the generation of electricity to serve Oregon customers.[3]

Moreover, ORS 469A.420 directs DEQ, and not the Commission, to determine baseline emissions level, necessary emissions reduction, and to verify utility clean energy plan (CEP) emissions reduction forecasts according to DEQ methodologies adopted pursuant to ORS 468A.280. HB 2021 cleanly divides the law's responsibilities: the Commission investigates how utilities will plan and invest in their electricity systems to meet HB 2021's targets, while the DEQ verifies the resulting emissions to determine if utilities have complied. For these reasons, we concur with the Commission's initial conclusion that RECs are not relevant to demonstrate compliance with ORS 469A.400 to 469A.475, and that the Commission lacks the discretion to create this requirement.

The Joint Utilities understand that issues regarding REC accounting are important to certain stakeholders, including concerns about the potential double counting of the environmental attributes of renewable energy used to comply with HB 2021. However we do not share that concern, because reporting actual emissions from the MWhs of electricity generated or purchased to serve end users in Oregon (regardless what happens to RECs from the underlying generation), cannot constitute a double-claim. HB 2021 did not change DEQ emissions reporting methodologies or how utilities use or retire RECs, and if entities nonetheless believe that HB 2021 presents a double-counting concern regarding these requirements (that have been in place since 2009), this concern is misplaced and outside the scope of HB 2021.

By June first of each year, investor-owned utilities must report the emissions from the previous calendar year based on the MWh of electricity generated or purchased to serve end users in Oregon.[4] Generally, utilities calculate total emissions by multiplying the emissions factor assigned to each generating resource by the MWhs produced by each resource.[5] Generation from renewable energy resources is assigned an emissions intensity of zero, whether or not the utility has retained or retired the REC associated with the corresponding MWh.[6]

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[3] The Staff Measure Summary to Senate Bill 38 (2009) stated that the bill "Authorizes [Environmental Quality Commission], with regard to electricity, to adopt rules requiring reporting of information necessary to determine greenhouse gas emissions from generating facilities used to produce electricity and related electricity transmission line losses." (available here) (last accessed 7/17/2023).
[4] OAR 340-215-0120(1).
[5] OAR 340-215-0120(2) (DEQ has a separate methodology for multi-jurisdictional utilities).
[6] OAR 340-215-0120(6)(a).

Consistent with this methodology, utilities may not reduce the emissions intensity for fossil fuel resources—or further decrease the emissions intensity for renewable resources below zero—by acquiring or retiring RECs. Rather DEQ's reporting is based on the portion of actual emissions released into the atmosphere per MWh of electricity produced to serve Oregon end users. This is a scientific GHG emissions accounting method that tracks actual emissions, and should not be confused with REC-based accounting systems that track MWhs of renewable energy generation used to substantiate renewable energy claims.

As such, 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. Compliance is not measured by the energy produced by a utility, but by the overall GHG emitted or allocated to Oregon retail customers.[7] Thus, utilities can meet their obligations to reduce emissions under ORS 469A.410 (while also continuing to serve customers under ORS 757.020) with any combination of resources that reduce emissions: whether greater energy efficiency, shaving peak through demand response, promoting more customer-sited generation, additions of storage, to name a few.

Different regulatory requirements can require different means of compliance without conflicting or creating double-counting concerns. Because RECs are neither needed for, nor affect, generation claims where generation attributes are directly measured (as in DEQ reporting under ORS 468A.280), there is no double-counting between that production and any consumption claims where RECs are used in compliance with ORS 469A.052 and ORS 469A.070. DEQ's methodology for emissions accounting does not constitute a claim to renewable energy.

To further highlight this point, DEQ's emissions accounting methodology and HB 2021 do not require the tracking of electricity to end use retail customers.[8] While DEQ rules require reporting information related to the electricity "delivered or distributed to end users in this state,"[9] this language specifies the portion of emissions associated with Oregon's electricity usage (distinct from electricity usage in nearby states supplied by utilities in Oregon). In the

[7] ORS 469A.410 (requiring a reduction in greenhouse gas emissions, not as a rate per MWh); *see also*, ORS 468A.280(4)(a)(A) and (4)(a)(B) (requiring reporting of GHG emissions *emitted* from generating facilities (emphasis added)).
[8] ORS 469A.410(2).
[9] OAR 340-215-0120.

same way, the DEQ requires utilities to report emissions associated with power imported or allocated to serve end users in Oregon, to provide the full picture of the emissions associated with serving end users in Oregon. This language is not intended to track emissions and generation to retail customers for the purposes of making consumption claims, and cannot support the argument that RECs are relevant to HB 2021.

If RECs were required for compliance, the legislature could have easily mentioned their use. It did not,[10] and went to great lengths to reach the opposite conclusion, by specifying that HB 2021 does not establish a standard that requires tracking electricity to end use customers,[11] that measures compliance in actual emissions,[12] and directs that the emissions of the resource are, in fact, the emissions of the resource.[13] As was often referenced by the parties when negotiating the bill, under HB 2021, "wind is wind, and gas is gas."

Oregon does not "hide elephants in mouseholes."[14] Because the plain language of the law is focused on emissions, RECs simply are not relevant to comply with HB 2021.

### B. HB 2021's public interest factors are adequately descriptive, and no additional interpretive guidance is needed at this time.

The Joint Utilities agree with the Commission that HB 2021's public interest factors provide "significant discretion," and that each factor "may be better suited to discussion after having been applied to specific facts" in reviewing initial utility CEPs.[15]

For example, the Legislature provided the Commission with five specific considerations, and one open ended consideration to determine whether a CEP is in the public interest. The Joint Utilities suggest that the phrase "in the public interest" should be interpreted by strictly applying paragraphs ORS 469A.420(2)(a) through (2)(e), and then by considering "other relevant factors" if needed within the context of the first five paragraphs. This standard of decision is consistent with Commission public interest precedent, and no additional Commission guidance is needed at this time. However, we provide one additional point for the Commission's consideration.

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[10] The Joint Parties note that the Legislature referenced ORS 469A.052 in ORS 469A.440, but did this because it merged the reliability exemption formerly found in ORS 469A.062 with the reliability pause provision provided by ORS 469A.440. *See* Enrolled HB 2021 (2021), Section 16 (repealing ORS 469A.062).
[11] ORS 469A.410(2).
[12] ORS 469A.420.
[13] ORS 469A.430.
[14] *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 468 (2001).
[15] Order No. 23-194 at 5.

In interpreting statutes, a reader should derive the plain meaning from the text and context to determine the Legislature's intended meaning, resorting to legislative history if necessary, and then relying on maxims or canons of statutory construction to resolve remaining areas of uncertainty.[16] The meaning of the text "the commission shall consider" is plain, and the Commission must consider the substantive factors listed; the more open question is how the Commission should apply its discretion when considering any "relevant factor" to determine whether CEPs are in the "public interest." Longstanding Commission precedent indicates that the Commission's authority to apply open-ended considerations is permissive, not mandatory.

This type of public interest directive is not unique to ORS 469A.420,[17] and the Commission has a large number of statutes that require considering the public interest.[18] To highlight one, the Commission's approval of telecommunication utility rate plans provides discrete factors that the Commission must consider in finding that the plan "is in the public interest," while also providing the Commission to consider "among other matters" as needed.[19] In the Commission's past application of ORS 759.255—and by inference how it should interpret ORS 469A.420—the Commission concluded that it is allowed, but not required, to consider "other matters" or "other relevant factors" when determining whether a rate plan was in the

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[16] *Portland General Electric Co. v. Bureau of Labor and Industries*, 317 Or. 606, 610, 859 P.2d 1143 (1993) (text of a statutory provision is the starting point for interpretation and best evidence of legislature's intent); *State of Oregon v. Gaines*, 346 Or. 160, 172, 206 P.3d 1042 (2009) (court may consult legislative history when it appears useful to analysis, after examining text and context, but it is up to the court to determine what weight to apply to the legislative history); ORS 174.020 (to assist in construction of a statute, a party may offer legislative history).

[17] Context, for purposes of statutory interpretation, include other provisions of the same statute and other related statutes. *PGE v. BOLI*, 317 Or. at 611. The Joint Utilities suggest that the Commission consider other statutes that use the same term and its interpretation of those statutes as context for interpreting ORS 469A.420.

[18] ORS 757.140 (allowing the Commission to include certain costs in rates if it finds retirement of a utility plant "in the public interest"); ORS 757.245 (allowing the establishment of joint rates whenever deemed by the commission to be "desirable in the public interest"); ORS 757.269 (allowing the Commission, during certain ratemaking proceedings, to reflect considerations the Commission deems relevant to protect the public interest); ORS 757.273 (directing the Commission to regulate rates, terms and conditions for attachments "in the public interest"); and ORS 757.386 (the Commission must adopt rules for community solar that "protect the public interest"); *see also*, ORS 757.285, ORS 757.412, ORS 757.415, ORS 757.490, ORS 757.495, ORS 757.500, ORS 757.511, ORS 757.516 and ORS 757.607.

[19] ORS 759.255 provides in part: "(2) Prior to granting a petition to approve a plan under subsection (1) of this section, the commission must find that the plan is in the public interest. In making its determination the commission shall consider, among other matters, whether the plan:

"(a) Ensures prices for telecommunications services that are just and reasonable;
(b) Ensures high quality of existing telecommunications services and makes new services available;
(c) Maintains the appropriate balance between the need for regulation and competition; and
(d) Simplifies regulation."

public interest.[20] Thus, for purposes of applying ORS 469A.420(2)(f), because the language contains "as determined by the commission," the Joint Utilities note that no additional considerations are required by the statute and that, consistent with the Commission's discretion, CEPs may be acknowledged solely on the basis of the first five considerations in ORS 469A.420 (2)(a)–(e).

Additionally, the canon of statutory construction that provides that the specific language in a statute must govern over the general, supports a constrained reading of "relevant factors" to only those reasonably related to the specific factors in ORS 469A.420(2)(a) through (e).[21] Applying this rule to the use of "relevant" in ORS 469A.420(2)(f) constrains the Commission in its analysis of "in the public interest" and "other relevant factors" to only those considerations that are similar to the five substantive provisions found in ORS 469A.420(2)(a) through (e). Under this interpretation, the Commission cannot consider broad ranging policy arguments under the "relevant factors" prong (for example, regarding the in-state siting of resources), unless tied to one of the previously identified substantive provisions (like the economic and technical feasibility of the plan or the effect of the plan on the reliability and resiliency of the electrical system).

Should the Commission determine that HB 2021's five substantive factors are sufficient to make a public interest determination as it did in *CenturyTel*, then no other relevant factors need to be addressed. And if HB 2021's five factors are inadequate, the Joint Utilities believe that the Commission has significant experience and precedent to draw from when evaluating whether a CEP is in the public interest, and that no additional guidance is needed at this time.[22] And regardless the approach, the Joint Utilities stress that additional Commission guidance should apply only to future IRPs/CEPs, as the initial utility CEPs were developed prior to the initiation of this docket.

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[20] *In re CenturyTel Price Plan,* Docket No. UM 1686, OPUC Order No. 14-347 at 7-8 (Oct. 7, 2014).
[21] ORS 174.020(2); *PGE v. BOLI*, 317 Or. at 611.
[22] For example, the Commission could draw from its familiar IRP analyses, because ORS 469A.415 requires CEPs to be developed concurrently with, and "based on or included in," utility IRPs, and Commission IRP Guideline 1.d provides that IRPs "must be consistent with the long-run public interest as expressed in Oregon and federal energy policies."

## C. HB 2021's policy statements provide helpful context, but do not create substantive requirements.

The Joint Utilities agree with the Commission that HB 2021's policy statements "generally will not . . . alter" the Commission's "interpretation of clear language used in the operative sections of the law."[23] The Joint Utilities also agree that, in particular, HB 2021's policy statements do not create an in-state preference for siting non-emitting resources, and that additional environmental justice initiatives are better suited for other channels.[24]

### *i. The Commission can refer to HB 2021's policy statements when applying specific statutory provisions, but these policies must be balanced against competing Oregon energy and climate policies.*

Oregon law is consistent that while statements of general policy can serve as contextual guides to aid in determining the meaning of particular statutes,[25] they "should not provide an excuse for delineating specific policies not articulated in the statutes."[26] Thus, while ORS 469A.405 discusses the goals of HB 2021, these policies "by its terms, imposes no requirement that the agency do anything."[27] This is because "policy goals are not always subjected to the

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[23] Order No. 23-194 at 5.
[24] *Id.* at 5–6.
[25] *See, e.g., Department of Land Conservation and Development v. Jackson County*, 151 Or.App 210, 218, 948 P.2d 731 (1997) ("Such expressions *can* serve as contextual guides to the meaning of particular provisions of the statutes or rules, as much as any other parts of the enactment can. At the same time, the use of expressions of policy as context is subject to the same limitations as any other proffered type of context: they are instructive only insofar as they have a genuine bearing on the meaning of the provision that is being construed . . . courts must be cautious not to *make* policy in the guise of interpretation." (emphasis in original)); *Anderson v. Peden*, 284 Or. 313, 320, 587 P.2d 59 (1978) ("When a statute or other legislation is prefaced by a list of 'purposes,' these purposes are not ipso facto standards to govern administrative decisions under it. Depending on what other standards the legislation states or requires to be adopted, the statement of purposes may or may not be intended to serve that role."). Perhaps because of these cases and others, policy statements are disfavored by bill drafters because such statements can cause misunderstanding in interpretation and are often more ambitious than the scope of the substantive law. *See,* Office of the Legislative Counsel, Bill Drafting Manual, at §7.4, available at https://www.oregonlegislature.gov/lc/PDFs/draftingmanual.pdf (last accessed 7/10/2023).
[26] *Warburton v. Harney County,* 174 Or.App. 322, 329, 25 P.3d 978, *rev. den.,* 332 Or. 559, 34 P.3d 1177 (2001) (internal citations omitted).
[27] *Pharma v. Oregon Dep't of Hum. Servs. ex rel. Off. of Med. Assistance Programs*, 199 Or. App. 199, 208, 110 P.3d 657, 661–62 (2005), *citing, Northwest Natural Gas Co. v. PUC,* 195 Or.App. 547, 556, 99 P.3d 292 (2004) (statutory statements of policy may serve as useful context for a statute, but courts should be cautious about reading more into them) and *School Dist. No. 1 v. Teachers' Retirement,* 30 Or.App 747, 752, 567 P.2d 1080 (1977), *rev. den.*, 281 Or. 1 (1978) (hortatory phrasing of statutory purpose does not appear to mandate anything that is justiciable).

critical and sometimes contentious scrutiny in the legislative process that is lavished on important operative words."[28]

To highlight one example, in *Peacock v. Veneer Services*, a claimant argued that he was entitled to certain vocational services, and that denying those services violated a policy statement that favored quick rehabilitation of injured workers.[29] The court disagreed, and even though the administrative rule "arguably conflicts to some degree with the legislature's broad policy," denied the claim because the specific statutory authority controlled over the general policy statement.[30] Consistent with *Peacock,* the policy statements in ORS 469A.405 can provide context to interpret ORS 469A.400 to 469A.475 where appropriate; yet these policy statements cannot create independent substantive requirements, and must be rooted in other, substantive, sections of the law beyond ORS 469A.405.

Further, ORS 469A.405 is one of many policy statements bearing on Oregon's energy and climate policies. For example, ORS 469.010(2) provides state policy "that development and use of a diverse array of permanently sustainable energy resources be encouraged" and "that cost-effectiveness be considered in state agency decision-making relating to energy sources, facilities or conservation."[31] But ORS 469.310 specifies that "the need for new generating facilities . . . is sufficiently addressed by reliance on competition in the market" and not bounded by cost-effectiveness.[32]

These policy statements are difficult, if not impossible, to harmonize with ORS 469A.405. For example, how should the Commission reconcile ORS 469.310's notion of competition and ORS 469.010's direction of cost-effectiveness with ORS 469A.405(2)'s thumb-on-the-scale expression that generation should provide "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"? These are not qualities that competition is known to inherently create by itself, or qualities necessarily subject to cost-

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[28] *Ogden v. Bureau of Lab.,* 299 Or. 98, 102, 699 P.2d 189, 191–92 (1985).
[29] *Peacock v. Veneer Services*, 113 Or.App 732, 735, 833 P.2d 1364 (1992).
[30] *Id.*, citing ORS 174.020.
[31] ORS 469.010(2)(a) and (2)(f); *see also* (ORS 469.020) (defining "cost-effective" to mean that an energy resource during its life cycle results in delivered power costs to the consumer no greater than the comparable incremental cost of the least cost alternative resource).
[32] ORS 469.310.

effectiveness. The reasonable conclusion is that the Legislature did not intend for these various policy statements to impose substantive legal requirements.[33]

This reading supports the Commission's initial conclusion that HB 2021's policy statements—such as providing "additional direct benefits to communities in this state" to the "maximum extent practicable" or "minimizing burdens for environmental justice communities"—do not require Commission action at this time and are better suited for investigation in other proceedings. Under HB 2021, utilities meet the overall intent of ORS 469A.405's policy statements by adhering to the HB 2021's specific requirements (requirements such as including a risk-based examination of resiliency opportunities and by examining the costs and opportunities of using community-based renewable energy), not by being subject to novel requirements from non-binding, and in this case conflicting, policy statements.

*ii. Oregon cannot require—either directly or by implication—in-state siting of non-emitting generation resources.*

The Joint Utilities agree with the Commission and Representative Ken Helm that ORS 469A.405(2) does not create an in-state preference for siting non-emitting generation in Oregon.[34] But assuming the Legislature had—either directly or by implication—the preference would be unconstitutional.

The Commerce Clause of the US Constitution gives Congress the power to "regulate Commerce . . . among the several states."[35] This includes directly regulating interstate commerce, and also indirectly prohibits states from discriminating against out-of-state economic

[33] Many other Oregon policies raise similar questions for how each could be harmonized with ORS 469A.405: ORS 758.515 (promoting QF development; do CEPs have to promote QFs regardless the cost impacts compared to alternative resources?); ORS 469A.210 (promoting community-based renewable energy projects, including marine renewable energy resources located on or adjacent to coastal shorelands, as an "essential element of this state's energy future;" do CEPs have to contain marine renewables?); ORS 757.669 (setting a policy regarding consumer-owned utilities and the need to preserve and enhance the ability of those community-based utilities to provide electric power to their consumers; should utilities be required to consider municipalization as a means to promoting the "direct benefits to communities"?); ORS 758.210 (declaring that "public purpose will be served and public welfare will be promoted" by undergrounding facilities; does promoting "increasing energy security and resiliency" require CEPs to contain an assessment of undergrounding facilities?).

[34] Oregon 2023 Regular Legislative Assembly, Senate Committee on Energy and Environment, Public Hearing on HB 3179, at 41:30–43:05 (Apr. 27, 2023) (Rep. Ken Helm: "What we didn't do in HB 2021 was something I very much had hoped to do, but we fell short. And that was require some of those projects to be built in Oregon. HB 2021 didn't do that.") (available here).

[35] U.S. Const. Art. I, § 8, cl. 3.

interests. This latter power, the dormant commerce clause, "prevents the States from adopting protectionist measures and thus preserves a national market for goods and services."[36]

Under laws implicating the dormant commerce clause, courts first examine whether the challenged law is discriminatory, which "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter;"[37] and second, determine if the parties are similarly situated.[38] If both steps are satisfied,[39] courts apply strict scrutiny to determine if the law "is narrowly tailored to advance a legitimate local purpose."[40] Under strict scrutiny, the "State's burden of justification is so heavy that facial discrimination by itself may be a fatal defect,"[41] and these laws are "virtually *per se* invalid."[42]

Under these authorities, states cannot engage in parochial economic protectionism (which would include the in-state job and economic development arguments that some parties in this docket have urged the Commission to consider), and courts routinely strike down laws that attempt to "create jobs by keeping industry within the State."[43]

Applied to Oregon, creating an in-state preference from ORS 469A.405(2) would be facially discriminatory against out-of-state non-emitting generation, subject to strict scrutiny, and almost certainly found unconstitutional.[44] While a state can discriminate against other states if it

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[36] *Tennessee Wine and Spirits Retailers Ass. v. Thomas,* 139 S.Ct. 2449, 2460 (2019); *Oregon Waste Systems, Inc. v. Oregon Dep't of Env. Quality,* 511 U.S. 93, 98 (1994).
[37] *Oregon,* 511 U.S. at 99.
[38] *General Motors Corp. v. Tracy,* 519 U.S. 278, 298–311 (1997).
[39] If the law is facially neutral, Courts engage in a balancing test to determine whether "burden imposed . . . is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970) (Pike Balancing Test).
[40] *Tennessee Wine,* 139 at 2461.
[41] *Oregon,* 511 U.S. at 98 (citing *Hughes v. Oklahoma,* 441 U.S. 322 (1979)).
[42] *Id.* at 99 (original italics).
[43] *City of Philadelphia v. New Jersey,* 437 U.S. 617, 627 (1978); *see also, e.g., Wyoming v. Oklahoma,* 502 U.S. 437 (1992) (cannot require in-state coal plants to burn a certain percentage of in-state coal); *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.,* 511 U.S. 383 (1994) (cannot require recycling center to use in-state facilities); *South-Central Timber v. Wunnicke,* 467 U.S. 82 (1984) (cannot require all lumber be milled in state); *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1, 13 (1928) (cannot mandate in-state shrimp or clam production over another state).
[44] *Oregon,* 511 U.S. at 98; *Oklahoma,* 221 U.S. 229.

is a market participant,[45] no State "may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade."[46]

That said, parties occasionally confuse facially discriminatory laws where strict scrutiny is applied, and facially neutral laws where the Pike Balancing Test is applied.[47] For example, *PURA* stands for the proposition that any resulting economic impacts to out-of-state generators from a facially neutral Connecticut contested case decision regarding REC reporting practices was outweighed by the in-state environmental benefits created by the agency's decision.[48]

This case, and others like it that rely on *Pike*, simply are not relevant. Those cases involve laws that are facially neutral; where on first blush, both in-state and out-of-state economic interests appear to be treated similarly. Yet as discussed above, courts would be hard pressed to conclude that a purported in-state policy preference to build non-emitting resources to create "jobs," in "this state," to "the maximum extent practicable," is facially neutral.[49]

Even if ORS 469A.405(2) was facially neutral, *Pike* does not do the work that NewSun hopes it does. As *National Pork* notes, where some cases "focus on whether a state law discriminates on its face, the *Pike* line serves as an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose."[50] On this latter analysis, the "presence or absence of discrimination in practice" is decisive under *Pike*,[51] and the test only sanctions laws where the in-state benefits outweigh the resulting burdens to out-of-state interests

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[45] *United Haulers v. Oneida-Herkimer Solid Waste,* 550 U.S. 330 (2007) ("Given these differences, it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism. As our local processing cases demonstrate, when a law favors in-state business over out-of-state competition, rigorous scrutiny is appropriate because the law is often the product of simple economic protectionism. Laws favoring local government, by contrast, may be directed toward any number of legitimate goals unrelated to protectionism. Here the flow control ordinances enable the Counties to pursue particular policies with respect to the handling and treatment of waste generated in the Counties, while allocating the costs of those policies on citizens and businesses according to the volume of waste they generate.") (citation omitted); *Kentucky DOR v. Davis,* 553 U.S. 328 (2008).
[46] *Chemical Waste Management, Inc. v. Hunt,* 504 U.S. 334, 339 (1992).
[47] The Joint Utilities object to comments submitted by NewSun and added to the docket record on July 5, 2023, that provide legal argument. Under OAR 860-001-0310(2), -0310(4), and ORS 183.457 (3), only attorneys are permitted to provide legal argument, including the application of court precedent to the facts of particular contested cases.
[48] *Direct Energy Services, LLC v. PURA*, 347 Conn. 101 (2023).
[49] ORS 469A.405(2).
[50] *National Pork Producers Council v. Ross,* 143 S.Ct. 1142, 1157 (2023) (plurality opinion).
[51] *National Pork,* 143 S.Ct. at 1158; *Wyoming v. Oklahoma,* 502 U.S. 437, 456 (1992) ("Oklahoma attempts to discount this evidence by emphasizing that the Act sets aside only a "small portion" of the Oklahoma coal market, without placing an "overall burden" on out-of-state coal producers doing business in Oklahoma. The volume of commerce affected measures only the extent of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce.").

that result from facially neutral laws.[52] Accordingly, *Pike* does not permit discriminatory in-state preferences if a law is facially neutral; rather courts use *Pike* to "smoke out . . . hidden protectionism" of these seemingly nondiscriminatory laws,[53] and if found, strike them down.

Applied here, an in-state preference in ORS 469A.405(2) remains unconstitutional under *Pike*. While creating meaningful living wage jobs, promoting workforce equity and increasing energy security and resiliency are important policies, it is unclear how each is unique enough, and local enough, to the state of Oregon to justify discriminating against out-of-state generation resources, when the overarching goal of HB 2021 (to reduce greenhouse gas emissions to combat climate change—is a global concern that impacts all states.

States cannot "hoard a local resource—be it meat, shrimp, or milk [or in this case non-emitting generation resources]—for the benefit of local businesses."[54] The Commission would be correct to conclude that there is "ample legal precedent to support the legislature's decision not to include an in-state preference, and to prevent . . . creating one by implication."[55]

### D. The Commission's obligation to ensure continual progress is limited to reviewing individual IRPs/CEPs, not separate progress reports or compliance filings.

The Commission asks parties to comment on whether to require annual filings to show continual progress or to maintain the cadence through CEP/IRP filings. The Joint Utilities urge the Commission to not require annual filings because the administrative burden would be significant, the incremental value minimal, and the requirement contrary to the statutory scheme provided in ORS 469A.415.

The Commission is required to "ensure that electric companies demonstrate continual progress" under ORS 469A.415(6), and this sub-section suggests that it is specific to IRPs/CEPs.[56]

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[52] *Pike,* 397 U.S. at 142 ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.").
[53] *National Pork Producers Council v. Ross,* 143 S.Ct. 1142, 1158 (2023) (quoting R. Fallon, The Dynamic Constitution 311 (2d ed. 2013)).
[54] *Carbone,* 511 U.S. at 392.
[55] Order No. 23-194 at 5.
[56] Oregon Bill Drafting Manual, § 4.4.

This requirement is included in the statute that requires utilities to submit CEPs, and specifically references the CEP requirements in ORS 469A.415(4)(e). This directive is separate from the requirement for utilities to provide annual emissions reports to the DEQ and Commission, and that the Commission "shall use" these emissions reports to determine compliance with HB 2021's emissions targets (ORS 469A.420(4)). The statute's organizational context also suggests that sub-section six is specific to IRPs/CEPs. Sub-section one through three require utilities to create CEPs, and submit them to the Commission and DEQ within specific times; sub-sections four and five indicate what CEPs should include; while sub-section six (in addition to ORS 469A.420 and .435) provides, at least partially, the Commission's standard of decision for ensuring that electric company's demonstrate continual progress, and are taking actions as soon as practicable at reasonable costs.

Read together, the Commission's obligation to ensure continual progress is reasonably cabined to reviewing individual utility IRPs/CEPs, and not separate progress reports or compliance filings similar to those required by Oregon renewable portfolio standard (RPS), the annual emissions reports in ORS 469A.420, or the biennial report in ORS 469A.425. Further, because ORS 469A.415 requires development of CEPs concurrently with IRPs, the legislature statutorily provided the cadence it expected.

This interpretation is intuitive. ORS 469A.415(6) directs the Commission to evaluate continual utility progress as soon as practicable at reasonable costs. Generally, this would require the Commission to have appropriate information regarding utility baseline emissions, forecasted emissions reduction trajectories, load forecasts, resource cost and operational assumptions, and projected resource needs and procurement strategies, with each based on least-cost, least-risk principles. And it would be unreasonable to interpret ORS 469A.415(6) otherwise, for example as applying to anything other than IRPs/CEPs, when the legislature wrote all of ORS 469A.415 about just one topic—the requirements of a utility IRPs/CEPs.[57]

[57] This Joint Utilities note that this argument is currently pending in state court in two cases. *NewSun Energy LLC v. Oregon Public Utility Commission*, Deschutes County Circuit Court Case No. 22CV24304; and *NewSun Energy LLC v. Oregon Public Utility Commission*, Deschutes County Circuit Court Case No. 22CV37061. NewSun has argued that the text in the second half of ORS 469A.415(6) is not tethered to IRPs/CEPs, and is instead a free-floating requirement that applies to other Commission orders and activities, and that it specifically applies to a Commission order acknowledging a PacifiCorp IRP that pre-dates the January 1, 2022, effective date of ORS 469A.415(6), and also a Commission order acknowledging the final shortlist in PGE's 2021 All Source RFP. Oral argument on motions to dismiss these petitions for judicial review is schedule on September 7, 2023.

The Joint Utilities represent that specific IRPs/CEPs provide the Commission with the appropriate information to make the global determinations required by ORS 469A.415(6), as opposed to separate reports or compliance filings that would have to largely duplicate much of the information contained in utility IRPs/CEPs.

In practical terms, Commission review could look like the following. For initial utility IRPs/CEPs, the Commission should focus on the second condition in ORS 469A.415(6) that requires utilities to take actions as soon as practicable at reasonable costs. Because these are the initial IRPs/CEPs, there are limited opportunities to demonstrate continual progress (aside from forecasted emissions reductions), and no previous IRP/CEPs or emissions reports under ORS 469A.420(4) that establish relevant benchmarks to track progress. Accordingly, Commission review of initial utility IRPs/CEPs should focus more on steps to reduce emissions at reasonable cost first in the context of year-over-year emissions pathways toward future target years. Commission acknowledgement (or not) will confirm resource acquisition actions that form the basis for review of progress in IRP Updates and subsequent CEP/IRP cycles.

Subsequent IRPs/CEPs can then consider both the initial IRPs/CEPs, and the emissions reports provided under ORS 469A.415(4). This will provide the Commission with the appropriate information to verify continual emissions reductions, while also considering traditional IRP information to determine if utility strategies adhere to least-cost least-risk principles.

Given that HB 2021's emissions targets are not triggered until 2030 (multiple IRP/CEP planning cycles away), the Joint Utilities agree that the typical IRP/CEP acknowledgement processes provide adequate oversight. Of course, the Commission can use its "significant flexibility . . . to direct action by utilities that have failed to demonstrate continual progress and prompt action as required by Section 4(6)" if any course correction is needed.[58] But until then, the Commission should focus resources on individual IRP/CEPs, and not diffuse stakeholder and Commission attention on collateral filings that might provide suspect value (similar to the RPIP and related RPS compliance filings) and lack the foundational underpinnings of the biennial CEP/IRP filings. With the cadence of the IRP/CEP filings, and the public nature of utility action plans, RFPs and resource acquisitions springing from those IRPs, the Joint Utilities argue that

[58] Order No. 23-194 at 6.

there will be plenty of information for the Commission and stakeholders to determine if utilities are making progress toward HB 2021's goals without requiring additional annual reporting.

### E. The Commission should use Phase II to provide threshold guidance on three discrete aspects of HB 2021's cost-cap.

The Joint Utilities believe that HB 2021's cost cap is the most pressing area of uncertainty that requires Commission attention, and believe that the topics below should be prioritized for initial Commission guidance in the UM 2273 investigation.

Because cost cap filings under ORS 469A.445 can be initiated by a utility, third-party filing, even the Commission, the Joint Utilities do not agree that HB 2021 requires "a largely reactive PUC approach to the cost cap."[59] Accordingly, while many cost cap implementation topics can be most effectively addressed in Staff-led investigations following review of initial CEPs, direction from the Commission in UM 2273 that clarifies the Commission's approach on three discrete issues would focus subsequent Staff-led processes.

First, how should the Commission determine whether specific investments or costs contribute to compliance? We believe there will be significant discussions regarding how to divide resources that may be needed for meeting load (either energy, capacity, or both), but that may also contribute to reducing emissions from fossil fueled resources. Those discussions may turn on the analyses and acknowledgement of resource acquisitions in IRP/CEP action plans. Criteria regarding what evidence a petitioner may use to show "by a preponderance" that the investment contributes to compliance would be important to develop.[60] This issue is fundamental to the design of the cost cap.

Second, how should the Commission calculate the rate impact of "similarly situated investments"?[61] The Joint Utilities believe that this language mimics, to the greatest extent practicable, traditional cost of service ratemaking principles. However this analysis only provides a reasonable proxy for the Commission to examine the impact that particular investments could have on customer rates, because the cost cap is forward looking and based on

[59] Order No. 23-194 at 7.
[60] ORS 469A.445(2)(b).
[61] ORS 469A.445(3).

estimates of the anticipated rate impact of proposed investments.[62] As a result, there are likely mismatches between typical ratemaking practices and analyzing the prospective impacts to customer rates from HB 2021 resources. Consider the effects of depreciation: the Joint Utilities would anticipate that different investments and costs under the cost cap have different expected lifespans and depreciation schedules. Yet it is unclear how room under the cap would become available for additional investments once the cap is reached, based on relevant depreciation schedules.[63] And while a lower priority issue because it is unlikely that the cost cap will be reached in the near-term, it would be helpful to understand how to adjust "the cumulative rate impact if the initial rate treatment" was based on forecasted rate impacts.[64] Because of these and other issues, the Joint Utilities believe that all stakeholders would benefit from understanding how the cost cap would function in relation to traditional cost of service ratemaking principles.

Third, how do the RPS and HB 2021 cost caps align? The Joint Utilities agree with the Commission that HB 2021's cost cap is distinct from the RPS cost cap, and serves different purposes.[65] Nevertheless, resources that contribute to RPS compliance through generating qualifying electricity can also be the same resources that reduce GHG emissions, but this does not mean that the cost caps interact. The RPS cost cap is based on the incremental cost of compliance, and compares the costs from qualifying electricity with the costs from a proxy, non-qualifying electricity plant.[66] It is only these incremental costs that contribute to the RPS cost cap. In contrast, HB 2021's cost cap evaluates the entirety of rate impact of the investment (or portion) that contributes to compliance, and is unrelated to a proxy resource or incremental cost. The cost cap in ORS 469A.445 is geared toward understanding the true rate impact of HB 2021 investments.

The Joint Utilities urge the Commission to provide guidance on certain cost-cap issues, as resources discussed in the recently filed IRP/CEPs could—in the near future—be subject to a cost cap investigation. Similar to the Commission's rulemaking that implemented Oregon's RPS

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[62] ORS 469A.445(5) (rate determinations under the cost cap "may not be used as collateral or presumptive evidence in any other proceeding . . . including in a general rate case" or in a renewable adjustment clause proceeding in ORS 469A.120).
[63] ORS 469A.445 (4)(b) describes the limited duration during which an exemption to further compliance may occur. The Joint Parties assume that room under the cap would develop as investments depreciate and their impact on rates is therefore reduced.
[64] ORS 469A.445(3)(b).
[65] Order No. 23-194 at 7.
[66] OAR 860-083-0100.

cost-cap, threshold guidance and potential rulemakings could avoid future ad hoc determinations if these issues are raised in utility-specific filings.[67]

## III. CONCLUSION

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

Respectfully submitted July 24, 2023,

*/s/ Brendan J. McCarthy*
Brendan J. McCarthy, OSB No. 963556
121 SW Salmon Street, 1WTC 1301
Portland, OR 97204
(503) 464-7371
Brendan.McCarthy@pgn.com
*PGE Attorney*

*/s/ Zachary Rogala*
Zachary Rogala, OSB No. 222814
1407 W North Temple, Suite 310
Salt Lake City, Utah
(435) 319-5010
zachary.rogala@pacificorp.com
*PacifiCorp Attorney*

[67] *See In re Small Scale Renewable Energy Projects Rulemaking,* Docket No. AR 622, Order No. 21-464 at 4 (Dec. 15, 2021) ("We consider that, without the rules, we would have to decide on an ad hoc basis how to interpret elements of the standard in ORS 469A.120 to determine whether the investments the utility has made are compliant with the statute and eligible for recovery under ORS 469A.120."); *see also In re SB 838 Rulemaking,* Docket No. AR 518 (discussing renewable portfolio standard that included a rulemaking on the cost cap).