ORDER NO. 23-061

ENTERED Feb 24, 2023

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 2225

In the Matter of PUBLIC UTILITY COMMISSION OF OREGON, House Bill 2021 Investigation into Clean Energy Plans.	ORDER

DISPOSITION: RECONSIDERATION OF ORDER NO. 22-390 GRANTED IN PART; RECONSIDERATION OF ORDER NOS. 22-446 AND 22-477 DENIED

In this order, we review and discuss the objections to Order Nos. 22-390, 22-446, and 22-477 filed by participants in these dockets. We describe why we grant reconsideration of Order No. 22-390 in part, making a small modification to our order, and deny reconsideration of Order Nos. 22-446 and 22-477 entirely.

I. BACKGROUND AND PROCEDURAL HISTORY

On December 27, 2022, the Oregon Solar + Storage Industries Association (OSSIA), the Community Renewable Energy Association (CREA), and NewSun Energy LLC (NewSun) (collectively, the Applicants) requested rehearing or reconsideration of Commission Order Nos. 22-390, 22-446, and 22-477. The Applicants allege that the orders contain errors of law and fact, and that good cause exists to reconsider the decisions. NewSun supplemented this application with a filing made on December 27, 2022. On January 11, 2023, replies were filed by the NW Energy Coalition (NWEC); 3Degrees; PacifiCorp, dba Pacific Power, and Portland General Electric Company (PGE); Community Advocates; the Center for Resource Solutions; and the Sierra Club and Green Energy Institute.

Oregon House Bill (HB) 2021 obligates Oregon utilities to reduce greenhouse gases (GHGs) associated with serving Oregon retail customer load. HB 2021, codified as ORS 469A.400 to 469A.475, requires the state's large investor-owned utilities, PacifiCorp and PGE, and electricity service suppliers to decarbonize their retail electricity sales with consideration for direct benefits to communities. The emissions reduction targets established under ORS 469A.410 require PacifiCorp and PGE to reduce

GHG emissions by 80 percent below baseline emissions level by 2030, by 90 percent by 2035, and by 100 percent by 2040.

HB 2021 requires PGE and PacifiCorp to file Clean Energy Plans (CEPs). ORS 469A.415(1) and (2) require PGE and PacifiCorp to "develop a clean energy plan for meeting the clean energy targets set forth in ORS 469A.410 concurrent with the development of each integrated resource plan," and submit the plan to the Commission and the Oregon Department of Environmental Quality (DEQ). Under ORS 469A.415(4), the CEP must incorporate the clean energy targets, provide annual goals for actions that make progress toward the clean energy targets, demonstrate continual progress to the targets, and include analyses of resiliency and community-based renewable energy that are new to the Integrated Resource Planning (IRP) process.

ORS 469A.420(2) requires the Commission to acknowledge the CEP "if the commission finds the plan to be in the public interest and consistent with the clean energy targets * * *." In addition, ORS 469A.415(6) requires the Commission to ensure that the utilities demonstrate continual progress toward meeting the clean energy targets and take actions as soon as practicable to rapidly reduce emissions at reasonable costs to retail electricity consumers.

In January 2022, Staff initiated an investigation into CEPs under docket UM 2225, determining that developing guidance for initial CEPs was a priority for HB 2021 implementation.[1] In connection with an extensive public stakeholder process, Staff presented us with recommendations, and we issued four orders: first, Order No. 22-206, a decision made at the May 31, 2022 Public Meeting; second, Order No. 22-390, a decision made at the October 6, 2022 Special Public Meeting; third, Order No. 22-446, a decision made at the November 1, 2022 Public Meeting; and fourth, Order No. 22-477, a decision made at the December 13, 2022 Public Meeting.

In Order No. 22-206, we adopted Staff's threshold "Planning Framework" proposal, directing that initial CEPs be filed with the next IRPs, that they be developed consistent with the IRP analysis and IRP Action Plan, that utilities provide annual updates on utility actions and progress toward the annual goals described in the CEP with the IRP update, and taking no immediate action on compliance penalties at that time.

In Order No. 22-390, we adopted a Staff Recommendation setting forth expectations for the development of the roadmap of actions and goals and Community Lens analysis and directing PacifiCorp and PGE to consider this guidance in developing their first CEP filings. In our order, we provided further clarification that:

[1] *See* launch announcement here: https://edocs.puc.state.or.us/efdocs/HAA/um2225haa142050.pdf.

> "In the event that a utility is unable to meet any of those expectations encompassed by this order, we expect a full explanation of why doing so was infeasible or impractical. Such an explanation is likely to be helpful in the Commission's determination of whether to acknowledge a CEP that may have fallen short of these expectations."[2]

In Order No. 22-446, we adopted with modifications, a Staff recommendation to approve Staff's initial expectations for analytical improvements for CEP development and directed PacifiCorp and PGE to consider this analytical guidance in developing each utility's first CEP filings and associated IRP.

Finally, in Order No. 22-477, we adopted a Staff recommendation to open a rulemaking for CEP procedural rules.

II. DISCUSSION

A. Argument of Applicants

The Applicants argue that we must ensure that Oregon utilities take implementation actions as soon as practicable and demonstrate continual progress towards the statute's goals. Applicants state that the next IRP and CEP filed by each utility will be critically important to meeting the statute's first compliance target in 2030. The Applicants argue that various factors, including our administrative timelines, may render subsequent filings too late. The Applicants ask us to reconsider various decisions we made in Order Nos. 22-390, 22-446, and 22-477 to improve the efficacy of the upcoming IRPs and initial CEPs.

1. Binding Nature of HB 2021

The Applicants allege certain statements in Order Nos. 22-390, 22-446, and 22-477 indicating uncertainty about the binding nature of HB 2021 on Oregon utilities for compliance were made in error and provide good cause for reconsideration. Applicants argue HB 2021 GHG emission reduction targets are mandatory, and the Applicants ask us to correct the error by making a written statement that we view the HB 2021 emissions reduction targets as binding on electric utilities, that there will be compliance obligations on the utilities unless they have exemptions under the reliability pause or the cost cap, and that there will be consequences for failure to meet those targets.[3] Alternatively, they ask us to clarify that HB 2021 is not aspirational in nature, and that we will implement the statute's requirements as compulsory. The Applicants also ask that we open an expedited rulemaking to address consequences for non-compliance.

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[2] *See* Order No. 22-390 at 1 (Oct. 25, 2022).
[3] OSSIA, CREA, and NewSun Application for Reconsideration at 9-10 (Dec. 27, 2022).

2. Renewable Energy Certificate (REC) Accounting

The Applicants assert that we erred by delaying action to determine whether the law requires that RECs be retired to meet HB 2021's clean electricity target. Applicants argue that the underlying intent of HB 2021 is to convey all benefits of emission-free electricity to Oregon retail consumers, and that these consumers should receive those benefits from the associated RECs, which should not be sold to other entities. They also point to concerns by numerous stakeholders about potential double counting without a requirement that RECs be delivered to end consumers. The Applicants ask us to reconsider the "decision in Order No. 22-390 to offer 'no near-term guidance' on the 'the treatment of RECs associated with clean energy delivered to Oregon customers'"[4] and the "decision in Order 22-446 to not 'run major compliance and regional REC accounting questions to ground in this planning investigation,' but to launch a broader investigation into compliance issues at some unstated future time 'for HB 2021 target years.'"[5] Applicants ask us to determine that RECs must be retired for generating sources used for HB 2021 compliance, or alternatively, direct Staff to launch a new process to address the issue in the near term.

3. REC Reporting

The Applicants assert that good cause exists to reconsider our decision in Order No. 22-446 directing utilities to "report the approximate number of MWhs not associated with RECs reported in the referenced table that are generated from renewable energy technologies."[6] The direction revised Staff's recommendations regarding how utilities should report the sale of RECs, and the Applicants ask us to provide the additional transparency advised by Staff.

4. Emissions from All Thermal Resources

The Applicants assert the order failed to address stakeholders' concerns that thermal units currently serving Oregon load may continue operating with output serving loads in other states, thereby creating a "giant hole in HB 2021 compliance" that results "in virtually no overall reduction in greenhouse gas emissions."[7] The Applicants ask us to correct an error of law by requiring additional transparency in utility plans and reporting about intended and actual use of existing thermal units to serve loads outside Oregon.

[4] Id. at 16, n 29 (citing Order No. 22-390 at Appendix A at 14.).
[5] *Id*., n 30 (citing 30 Order No. 22-446 at Appendix A at 24.).
[6] *Id*., n 31 (citing Order No. 22-446 1.).
[7] *Id*. at 17.

5. Technical Feasibility

The Applicants argue that the order fails to require CEPs to make realistic assumptions; consider uncertainties around interconnection, transmission, permitting processes; and development timelines and plan for contingencies such as project delays or failures. Applicants ask us to issue a new order so requiring, and also to immediately launch a rulemaking to address criteria under ORS 469A.420(2)(f) for determining whether a clean energy plan is in the public interest and should be acknowledged.

6. Requirements Not Guidance for CEPs

The Applicants assert legal error regarding our determination that a regulated utility cannot be required to comply with an order entered in an investigation docket. They argue that such an order has the same legal force and effect as an order entered in any other docket, and that good cause exists to reconsider whether our orders in this docket should set forth as requirements rather than non-binding "guidance" to the utilities.

7. Continual Progress

The Applicants assert that we erred by "failing to adopt a meaning of 'continual progress' that results in a linear trajectory of GHG reductions from present through each of the mandatory targets."[8] "Year-over-year" emissions reductions may result in the utilities only making minor strides towards reducing GHG emissions in most years and illustrating compliance just in time to meet the targets. They argue that HB 2021 explicitly requires that the Commission shall ensure that utilities are taking actions as soon as practicable that facilitate the rapid reduction of GHGs. Therefore, Applicants state that as a baseline the continual progress should be a linear trajectory.

B. Responses of Participants

1. 3Degrees

3Degrees does not take a position on the application itself, including the requested changes regarding REC accounting and reporting, but provides comments on action still needed. 3Degrees seeks more clarity about the treatment of RECs within HB 2021 to avoid exacerbating market uncertainty and negatively impacting renewable energy developers. 3Degrees supports requirements for transparency on REC sales in CEP and IRP filings. 3 Degrees states that providing market participants with clear and accessible information about the renewable energy that is being counted by the utilities towards HB 2021 compliance, but not clarifying how to interpret this information, places the responsibility on administrators of other REC programs to determine whether double

[8] *Id*. at 4.

counting is occurring, resulting in a patchwork of decisions. 3Degrees argues that due to contractual difficulties, the unanswered question of REC eligibility across programs will likely have a chilling effect on the regional REC market. 3Degrees advises that it will become increasingly challenging for Oregon to make a decision on the treatment of RECs within HB 2021 the longer the question remains unanswered.

2. NWEC

Without either supporting or opposing the application, NWEC provides comments on some of the issues raised. Although NWEC does not believe there is confusion about the binding nature of HB 2021, NWEC supports further clarification on the issue to alleviate concerns. Viewing implementation of HB 2021 as an iterative process that could include confusion about what utilities must do, as opposed to what they could do, NWEC suggests we establish a "'floor' in terms of basic expectations that utilities must meet in developing individual CEPs."[9] NWEC acknowledges there is a need to resolve, in the near term, how emissions reductions standards in HB 2021 interact with the creation and uses of RECs, and encourages us to set forth plans to address the transparency of RECs. NWEC advises us to ensure there are appropriate resources for independent analysis of utilities' CEPs and asks that we define "continual progress." NWEC notes the interconnectedness of these two actions, observing:

> "The Commission should be able to determine whether a utility's Clean Energy Plan will achieve emissions reductions at a trajectory for them to achieve the required emission reduction targets or not. The Commission should not be in a position where they are reacting to a utility's failure to achieve the required targets but should be able to proactively provide additional requirements to a utility to help ensure that targets are actually met, whether the progress toward those targets are 'linear' or 'bumpy.'"[10]

3. Center for Resource Solutions (CRS)

CRS comments on the application's discussion regarding REC accounting. Acknowledging conflicting language in HB 2021, CRS asserts that if the statute creates targets with compliance obligations for the reduction of GHG emissions for electricity delivered to retail consumers in Oregon, then the ownership and retirement of associated RECs must be required to prevent double counting of this generation in other programs. CRS asks us to resolve the issue of whether REC retirement is required under HB 2021 as soon as possible and recommends that we require REC retirement. CRS cautions that allowing actual or perceived double counting could have multiple negative effects,

[9] NWEC Response to Application for Reconsideration at 2 (Jan. 11, 2023; resubmitted and signed Jan. 12, 2023).
[10] *Id*. at 4.

including legal challenges to power contracts and REC purchases, and eligibility and market limitations for Oregon RECs in other states, voluntary programs, and/or federal purchasing, which could also affect renewable energy project development and contracting decisions. Double counting would also affect the integrity of Oregon's own programs, such as Oregon's Renewable Portfolio Standard (RPS) program and Oregon's Clean Fuels Program (CFP).

4. Joint Environmental Parties (Sierra Club and Green Energy Institute)

The Joint Environmental Parties recommend we reconsider Order Nos. 22-390, 22-446, and 22-447. While they acknowledge these orders begin to guide utilities' development of initial CEPs, they argue the orders leave uncertainties about the utilities' obligations with important questions unresolved. The Joint Environmental Parties ask the Commission to make the following changes to the orders:

1. Amend Order No. 22-390 to state the binding nature of HB 2021;
2. Amend Order Nos. 22-390, 22-446, and 22-477 to state the binding nature of the Commission's initial expectations for the first CEPs;
3. Amend Order No. 22-446 to require the retirement of Renewable Energy Certificates ("RECs") for electricity used to comply with HB 2021 clean energy targets;
4. Amend Order No. 22-390 or No. 22-477 to direct Staff to immediately initiate a rulemaking in order to interpret ORS 469A.420(2) and establish other substantive CEP requirements; and
5. Amend Order No. 22-446 in order to direct the utilities to report both (1) prospectively on the emissions associated with their plans to sell the output of thermal resources to other entities or serve loads in other states and (2) on actual emissions from these resources.[11]

5. Joint Utilities (PacifiCorp and PGE)

The Joint Utilities assess the Commission decisions in docket UM 2225 to be both reasonable and correct as a matter of law and do not support the application's request for rehearing or reconsideration. The Joint Utilities argue the orders in docket UM 2225 appropriately adopted a guidance framework for utilities' initial CEPs that is aligned with statutory requirements for CEPs and are consistent with established administrative processes such as integrated resource planning. The Joint Utilities note that they have

[11] Joint Environmental Parties Response to Application for Rehearing or Reconsideration at 3 (Jan. 11, 2023).

already begun the associated processes of restructuring stakeholder engagement practices, community benefit indicators, and resource procurement.

The Joint Utilities indicate there is no disagreement that HB 2021 is binding, but it is reasonable rather than an error of law to delay the development of administrative penalties for lack of compliance. They also observe that the orders correctly concluded that HB 2021 is an emissions standard; reasonably determined that additional REC reporting was unnecessary given existing reporting and transparency; correctly concluded that HB 2021 is limited to retail electric sales in Oregon but does not apply to out-of-state sales; reasonably declined to adopt overly prescriptive and duplicative "technical feasibility" guidelines; correctly provided guidance and allowed utilities flexibility for developing their initial CEPs; and reasonably declined to recommend a linear trajectory for emissions reductions. For all of these reasons, the Joint Utilities assert that the application does not present sufficient cause for reconsideration or rehearing and should be denied.

6. Community Advocates

A group of twelve community members from across Oregon engaged in discussions about Oregon energy systems for several months. Eight members submitted comments following the application that shared personal stories, reflections, and ideas about resiliency for these systems, as well as support for clean, renewable energy and HB 2021 implementation.

C. Applicable Law

Oregon Revised Statute (ORS) 756.561 provides:

> (1) After an order has been made by the Public Utility Commission in any proceeding, any party thereto may apply for rehearing or reconsideration thereof within 60 days from the date of service of such order. The commission may grant such a rehearing or reconsideration if sufficient reason therefor is made to appear.
>
> (2) No such application shall excuse any party against whom an order has been made by the commission from complying therewith, nor operate in any manner to stay or postpone the enforcement thereof without the special order of the commission.
>
> (3) If a rehearing is granted, the proceedings thereupon shall conform as nearly as possible to the proceedings in an original hearing, except as the commission otherwise may direct. If in the judgment of the commission,

> after such rehearing and the consideration of all facts, including those arising since the former hearing, the original order is in any respect unjust or unwarranted, the commission may reverse, change or modify the same accordingly. Any order made after such rehearing, reversing, changing or modifying the original determination is subject to the same provisions as an original order.

Oregon Administrative Rule (OAR) 860-001-0720(2) requires that an application for rehearing or reconsideration specify,

> (a) the portion of the challenged order that the applicant contends is erroneous or incomplete;
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> (b) the portion of the record, laws, rules, or policy relied upon to support the application;
>
> (c) the change in the order that the Commission is requested to make;
>
> (d) how the applicant's requested change in the order will alter the outcome; and
>
> (e) one or more of the grounds for rehearing or reconsideration in section (3) of this rule.

Section (3) of the rule provides that the Commission may grant an application for rehearing or reconsideration if the applicant shows that there is:

> (a) New evidence that is essential to the decision and that was unavailable and not reasonably discoverable before issuance of the order;
>
> (b) A change in the law or policy since the date the order was issued relating to an issue essential to the decision;
>
> (c) An error of law or fact in the order that is essential to the decision; or
>
> (d) Good cause for further examination of an issue essential to the decision.

Under OAR 860-001-0720, an application for reconsideration or rehearing is deemed denied if the Commission has not issued an order granting the application by the 60th day after filing. If the application is granted, the Commission may affirm, modify, or rescind its prior order or take other appropriate action.

III. RESOLUTION

HB 2021 speaks for itself, and it is not an error of law for us to be silent on its binding nature in preliminary implementation orders. In no order have we in any way suggested that HB 2021 does not impose obligations on utilities. Despite this, we continue to observe that participants in this process question our view of this fundamental principle, and to end this discussion we agree to clarify our position explicitly. Accordingly, we grant, in part, reconsideration of Order No. 22-390 for good cause shown, and modify our order on page 1, paragraph 2 to add the underlined sentence:

> We appreciate the value of Staff, interested parties and stakeholders coming together to have a shared view on so many aspects of this first Clean Energy Plan filing. By approving Staff's initial expectations for the development of the roadmap of actions and goals and Community Lens analysis, and by directing PacifiCorp, dba Pacific Power, and Portland General Electric Company to consider this guidance in developing each utility's first Clean Energy Plan (CEP) filings, we intend to bring clarity regarding how the utilities should approach the plan. <u>We note that the emission reduction framework described in HB 2021 is legally binding on utilities, and utilities must meet the targets subject to the exceptions outlined in the legislation.</u>

All other requests for reconsideration are denied, as Applicants have demonstrated no error of law or fact.

We have discretion to manage the sequence, timing, and process used to address the many policy and legal questions associated with HB 2021, and Applicants do not establish that our orders to date represent legal error in implementing HB 2021. We are acting in a timely and deliberate manner to implement all aspects of HB 2021 through processes designed to make the many policy and legal determinations associated with implementation of this transformative legislation in a logical order, considering the realities of the utility IRP, CEP and procurement cycle and the resources of our Staff and other participants. We remain in the process of examining the questions Applicants assert our orders were legally required to address and will determine whether and how to resolve them in a variety of processes as implementation continues, reaching final determinations in due course. It is not an "error of fact" to take a reasonable amount of time to sequence implementation actions and consider the necessity and the most appropriate process and timing in which to address the questions that Applicants raise.

We reject Applicants' assertion that we erred by taking a legally incorrect position on the binding, or non-binding, nature of orders issued in investigation or other-than-contested-case dockets. We have made no determination on that broad question in any order at

issue. Our decision to adopt guidance for initial CEPs as part of a larger process to implement HB 2021 is well within the discretion provided to us by the legislature. It does not preclude, and is consistent with, other future actions we have consistently expressed an intention to take to further implement HB 2021. Going forward, we may adopt rules, issue orders in contested cases, and issue orders in other-than-contested cases. Nothing in Order Nos. 22-390, 22-446, and 22-477 implies a view that we lack the authority to establish binding obligations on utilities through any of those actions.

IV. ORDER

1. Reconsideration of Order No. 22-390 is granted in part. Order No. 22-390 is modified on page 1, paragraph 2 to state:

> We appreciate the value of Staff, interested parties and stakeholders coming together to have a shared view on so many aspects of this first Clean Energy Plan filing. By approving Staffs initial expectations for the development of the roadmap of actions and goals and Community Lens analysis, and by directing PacifiCorp, dba Pacific Power, and Portland General Electric Company to consider this guidance in developing each utility's first Clean Energy Plan (CEP) filings, we intend to bring clarity regarding how the utilities should approach the plan. We note that the emission reduction framework described in HB 2021 is legally binding on utilities, and utilities must meet the targets subject to the exceptions outlined in the legislation.

2. Reconsideration of Order Nos. 22-446 and 22-477 is denied.

Made, entered and effective on Feb 24 2023.

Megan W. Decker
Chair

Letha Tawney
Commissioner

Mark R. Thompson
Commissioner

A party may appeal this order by filing a petition for review with the Circuit Court for Marion County in compliance with ORS 183.484.