

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 2273

In the Matter of

PUBLIC UTILITY COMMISSION OF
OREGON,

Investigation Into House Bill 2021
Implementation Issues.

SCOPING ORDER

This order outlines a regulatory proceeding in which our goal is to efficiently advance implementation of HB 2021. In Phase I, we intend to do two things¹:

- (a) address promptly several issues on which Commission guidance can be helpful in the near term and does not require significant additional factual or policy development;
- (b) determine whether to continue to Phase II, in which we would provide Commission guidance on threshold issues whose resolution would make upcoming Staff-led HB 2021 implementation proceedings more efficient.

This order sets forth our selection of issues to address in Phase I(a) and I(b), as well as their sequencing and anticipated process. For Phase I(a) issues on which we have already received numerous comments—including HB 2021’s treatment of renewable energy credits (RECs)—we also set forth our preliminary expected resolution.

This proceeding sets the stage for future proceedings to be led by the Commission Staff in 2024, and complements our concurrent HB 2021 implementation activities, such as Clean Energy Plan (CEP) review in dockets LC 80 and LC 82, our proceedings addressing Electricity Service Supplier HB 2021 compliance (AR 651, UM 2024), and our related Request for Proposals dockets.

I. BACKGROUND

On February 21, 2023, Staff requested we initiate this docket to investigate issues related to implementation of HB 2021.

On March 16, 2023, Chief Administrative Law Judge Nolan Moser issued a memorandum (revised by ruling dated March 22, 2023) establishing a scoping process

¹ HB 2021 has been codified in ORS 469.400 et seq., as well as in amendments to ORS 469A.005, 469A.205, 469A.210, 757.247, 757.603, 757.646 and 757.649.

and identifying scoping questions to help the Commission establish a process to resolve issues related to its implementation of HB 2021. The scoping questions asked:

1. What open questions or issues need to be addressed or resolved by the Commission?
2. What should be the sequence of issues to be addressed?
3. What process or processes should be used to address issues?

The scoping process included two opportunities in April 2023 for submitting written comment, as well as an April 18, 2023 scoping workshop for Commissioner discussion and dialogue with interested persons and parties. We received written comments from the Oregon Citizen’s Utility Board, Portland General Electric Company, PacifiCorp, New Sun Energy LLC, Center for Resource Solutions, 3Degrees Group Inc., Green Energy Institute, Sierra Club, Rogue Climate, Metro Climate Action Team, Oregon Solar+ Storage Industries Association, Climate Solutions, Renewable Northwest, Coalition of Communities of Color, and NW Energy Coalition. Below, we describe our scoping determinations.

II. PHASE I(a) – PROMPT COMMISSION GUIDANCE ON NEAR-TERM, WELL-DEFINED ISSUES

A. Overview

In Phase I(a), we intend to address promptly several issues on which Commission guidance can be helpful in the near term and does not require significant additional factual or policy development. We will seek legal and policy briefing on the issues below, on dates and within page limits to be established by the Administrative Hearings Division (AHD). We note that because this docket is considered to be a contested case, briefing is allowed only by those with party status.

I(a)(1)	Can and should the Commission require retirement of RECs to demonstrate compliance with HB 2021? Does the answer depend on how the Oregon Department of Environmental Quality (DEQ) interprets and implements ORS 468A.280? If the Commission does not require retirement of RECs, can and should it otherwise restrict their use by utilities subject to HB 2021?
I(a)(2)	Before applying the “public interest” criterion for CEP acknowledgment, should the Commission give guidance on its interpretation of “economic and technical feasibility” or other specified factors in HB 2021 Section 5(2)? Should the Commission pre-determine other relevant factors for purposes of Section 5(2)(f)?
I(a)(3)	What relevance can and should the statements of policy in HB 2021 Section 2 have to the Commission’s implementation of the operative provisions of the law?

I(a)(4)	What procedural approach should the Commission take to oversee continual progress and prompt action by utilities, as required by HB 2021 Section 4(6)?
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Although we decline the request from several commenters to establish different dockets for each of these issues, we have labeled and grouped the issues so that parties can select discrete issues on which they wish to engage. In addition, if appropriate, AHD can establish different procedural schedules for briefing different issues. However, because our goal in this phase is to provide prompt guidance, we direct AHD to establish a procedural schedule that enables us to complete Phase I by October 1, 2023.

B. Issue I(a)(1) – RECs

This issue has been explored in both docket UM 2225 comments and in the scoping phase of this docket. Although this scoping order does not represent our final determination, and we invite further briefing, we think it important to advance the conversation by sharing our initial inclinations with the parties and other interested persons.

Our task in interpreting any statute is to discern the intent of the legislature, and here we view the legislative direction on this issue as clear. Section 7 of HB 2021 states that, for the purposes of determining compliance with Sections 1-15, electricity shall have the emission attributes of the underlying generating resource. By explicitly directing us to consider the emissions attributes of the underlying generating resource when determining compliance, the statute is implicitly directing us not to insert into our compliance determination an inquiry into the status of the REC that the underlying generating resource produced. With a statement so specific to the issue in the operative language of the statute, we do not see that we have discretion to interpret HB 2021 to allow us to insert a requirement that RECs be retired to demonstrate compliance.

With that said, the Commission’s compliance determinations also are informed by the emissions verification that HB 2021 assigns to DEQ. HB 2021, Section 5 directs DEQ to determine baseline emissions and the amount of emissions reduction necessary to meet the statute’s emissions reduction targets and to verify utility clean energy plan emissions reduction forecasts according to the methodology set forth in ORS 468A.280. DEQ has implemented ORS 468A.280 through an emissions reporting program described in OAR Chapter 340, division 215. Because DEQ’s emissions reporting is an input into our ultimate compliance determination, we recognize that differing views of DEQ’s methodology could be relevant to parties’ views of whether and how RECs are relevant to emissions reporting and thus to HB 2021 compliance.

Although we will not encroach on DEQ’s responsibility for interpretation and implementation of ORS 468A.280, we recognize that we and those interested in our HB 2021 compliance determinations need to understand DEQ’s emissions reporting methodology and its implications. As part of this docket, we intend to host an educational workshop on DEQ’s greenhouse gas accounting methodology and to invite comments on

its relevance to the Commission’s approach to HB 2021 compliance determinations and treatment of RECs. In that workshop, we also intend to explore how requiring the use of RECs as a compliance instrument might conflict with HB 2021, Section 15, which requires us to make the accounting and compliance frameworks of HB 2021 support and enhance access to existing and potential future electricity markets.

In advance of that workshop, we offer three initial observations. First, we note that the clear statement in HB 2021, Section 7 could be interpreted to control our approach to compliance determinations under HB 2021 notwithstanding DEQ’s methodology. Second, our current understanding of DEQ’s emissions methodology is that it does not take RECs into account, and thus would not conflict with our initial interpretation of HB 2021, Section 7. Third, the characterization of DEQ’s methodology and thus HB 2021 as “generation-based” rather than “load-based”—definitions that we intend to explore in the workshop—may mitigate concerns about double counting of emissions claims associated with RECs not retired for HB 2021 compliance.

Assuming that we decline to require retirement of RECs, a final question is whether we should otherwise restrict regulated entities’ use of RECs not retired for HB 2021 compliance to avoid concerns about double counting of emissions claims. As stated above, it is possible that viewing DEQ’s methodology and thus HB 2021’s as “generation-based” may mitigate some concerns about double counting. If double counting concerns remain, as we suspect they may, we propose to speak to our responsibility and authority to address and remedy such concerns by restricting the use of RECs not retired for HB 2021. We offer an initial view that we do not have authority or responsibility to globally restrict the use of RECs not retired for HB 2021. We recognize that regulators and certifiers responsible for REC-based programs may have to adapt to HB 2021, but it is not clear to us that the law gives us authority to restrict the use of RECs not retired for HB 2021 to avoid what such regulators and certifiers may conclude are double-counting impacts. We seek feedback on this initial conclusion.

We do note that we have a direct role in overseeing certain Oregon REC-based programs, and we intend to consider the impact of any double-counting concerns created by HB 2021 on the programs we regulate. We will seek input from the parties in Phase I(b), as discussed below, on which Oregon-regulated programs need examination of the viability of REC emissions claims after 2030 and with what level of priority or timeline.

C. Issue I(a)(2) – Public Interest

HB 2021 requires us to acknowledge CEPs that are “in the public interest,” listing several specific public interest factors that must be considered and giving us discretion to determine and consider “any other relevant factors.” Parties and other interested persons have asked us to provide guidance on how we will interpret the public interest generally, the specified factors (especially, “economic and technical feasibility”), and whether there are other factors we expect to consider under Section 5(2)(f).

Initially, we observe that these are general factors, with significant discretion left to the Commission, and that these factors may be better suited to discussion after having been applied to specific facts in our initial CEP review. However, we are open to briefing from parties on guidance that may be appropriate for us to give to narrow and streamline how parties approach initial CEP review.

D. Issue I(a)(3) – Policy Statements

As with many other laws, HB 2021’s operative provisions are preceded by a statement of the “policy of the State of Oregon.” This policy statement addresses, among other things, community benefits, tribal consultation, and burdens on environmental justice communities. Several of these topics are addressed in more detail in the operative provisions of HB 2021: Section 4 requires CEPs to examine community-based renewable energy and resiliency, and Section 6 requires utilities to convene advisory groups including environmental justice communities. The Staff-led process in docket UM 2225 emphasized guidance on analysis of community benefits and community-based renewable energy, and advisory groups are underway. Here, parties and interested persons have asked what additional relevance the statements of policy in HB 2021, Section 2 can and should have on implementation of HB 2021.

We have noted previously, in a related context, that policy statements generally will not lead us to alter our interpretation of clear language used in the operative sections of the law.² Policy statements can be helpful, however, in guiding our interpretation of ambiguous or delegative statutory provisions and informing our selection of discretionary initiatives to pursue.

Here, parties and interested persons have asked specifically whether, on the authority of Section 2, we will require utilities to prefer in-state resources; if not, parties and other commenters inquire how we will give relevance to Section 2(2). We are inclined to conclude that some, perhaps limited, statement of our intentions on this specific topic will be useful to initial CEP review and we seek comments to inform this statement.

As we did with Issue I(a)(1), we offer here a preliminary inclination for parties’ reactions: HB 2021 does not assert a requirement or preference for in-state resources. There is ample legal precedent to support the legislature’s decision not to include an in-state preference, and to prevent us from creating one by implication. HB 2021 does appropriately favor maximizing community and resiliency benefits in reaching emissions reductions, and we believe that our guidance and Staff’s ongoing effort to emphasize analysis of these benefits in CEPs and associated procurement is a legally appropriate way to implement HB 2021.

Commenters also have inquired about what specific actions we may take to minimize HB 2021’s burdens on environmental justice communities, and otherwise how we will give relevance to Section 2(4) in applying HB 2021’s operative provisions. Although we are

² *In the Matter of Small Scale Renewable Energy Projects Rulemaking*, Docket No. AR 622, Order No. 21-464 at 5-6 (Dec. 15, 2021).

not inclined to use this docket to identify new discretionary environmental justice initiatives, which are better developed through other channels, we are open to specific feedback about how Section 2(4) should inform our application of CEP acknowledgment criteria.

E. Issue I(a)(4) – Continual progress and annual goals

Section 4(4) sets forth certain requirements for CEPs. Among them are “annual goals . . . for actions that make progress” and “demonstrat[ion of] . . . continual progress” toward meeting the emissions reduction targets in Section 3. Section 4(6) requires us to “ensure” this continual progress and that actions toward the targets are being taken “as soon as practicable . . . at reasonable costs.” We addressed in docket UM 2225 some substantive elements related to these issues,³ but we did not address the procedural aspects of how we intend to evaluate and ensure progress and timely actions.⁴

A threshold question is whether we should oversee continual progress and prompt action using processes like our usual practices for Integrated Resource Plan (IRP) review and acknowledgment, or whether we should establish different or additional processes—for instance, annual filings like the separate implementation plan and compliance filings under the renewable portfolio standard (RPS). At the outset, at least before the first compliance target in 2030, we are inclined to rely on our CEP review and acknowledgment decisions to accomplish this oversight. We have significant flexibility in our acknowledgment orders to direct action by utilities that have failed to demonstrate continual progress and prompt action as required by Section 4(6). Furthermore, we have found the separate RPS implementation plan filing requirement to be duplicative, providing little to no added value over IRPs. RPS compliance reports are worthwhile but are a basic filing necessary for us to ensure retirement of RECs required for compliance years. We seek comment on whether to require similar annual filings for CEPs (which presumably would include emissions results from DEQ and a report on annual actions taken pursuant to the CEP) or to maintain an appropriate cadence of CEP/IRP updates, and we wish to understand the relative administrative burden and incremental value to moving utilities falling short of continual progress back on track through annual compliance reports.

Again, we provide our preliminary inclinations to guide briefing by interested parties, and we remain open to contrary arguments and different suggestions. Our Phase I(a) decision will establish a general direction; accordingly, in briefing, we do not expect discussion of procedural details to be established for either path.

³ Principally, we set an expectation that utility CEPs (1) provide ongoing updates on their progress toward their annual goals and forecasted impacts and (2) evaluate, in initial IRP/CEPs, rates of forecasted emissions reduction that, at minimum, provide year-over-year reductions.

⁴ *In the Matter of Request to Issue Notice of Proposed Rulemaking for Clean Energy Plan Procedural Rules*, Docket No. UM 2225, Order No. 22-477, at Appendix A at 9 (Dec. 14, 2022) (“UM 2225 surfaced issues related to ensuring continual progress and enforcing annual planning goals. These compliance issues are important to address but this rulemaking is not an appropriate venue.”)

F. Phase I(b) – Identification and scoping of potential Phase II issues

The purpose of Phase I(b) is to determine whether to initiate a second phase. The purpose of Phase II, if initiated, would be to provide Commission guidance on threshold issues whose resolution would make upcoming Staff-led HB 2021 implementation proceedings more efficient. Our intention in Phase II would not be to resolve all the details of implementation issues that are better suited development via Staff-led stakeholder processes; rather we would provide those Staff-led processes a foundation by providing Commission guidance on any significant threshold issues.

In Phase I(b), we will inform our decision whether to establish a Phase II by seeking legal and policy briefing, on dates and within page limits to be defined by AHD, on the following issues:

I(b)(1)	Are there threshold issues of interpretation related to HB 2021, Section 10 (“Cost cap for electric utilities”) on which advance Commission guidance would be useful and beneficial?
I(b)(2)	Oregon-regulated REC programs
I(b)(3)	Additional issues

G. Issue I(b)(1) – Cost cap

HB 2021, Section 10 establishes a cost cap for electric utilities. Distinct from the RPS cost cap, PUC action under the CEP cost cap must be triggered by a third-party filing, and procedures for PUC response to the filing are set forth in the statute. Because HB 2021 dictates a largely reactive PUC approach to the cost cap, and because the relevance of the cost cap would not be obvious before initial CEP review, Staff appropriately has not prioritized guidance on this issue.

In scoping comments, utilities expressed a desire for guidance on cost cap issues ahead of the next CEPs. Although we largely believe this guidance is best suited to initial development in CEPs or in Staff-led proceedings (if Staff concludes that cost cap should be prioritized), we ask whether there are threshold issues of interpretation whose resolution would make CEP development or future Staff-led investigation more efficient.

Potential examples include: what factors determine whether an “investment or cost” contributes to compliance with HB 2021; whether resources required for RPS compliance are included or excluded; how the six percent HB 2021 and three percent RPS cost caps interact; and how “similarly situated investments or costs” would be determined, particularly for IRPs constrained to meet HB 2021 targets.⁵ In this stage of briefing, we ask parties to limit their responses to informing us as to how they prioritize these issues, or others, and whether these questions can and should be answered without further factual development.

⁵ House Bill 2021, Section 10(3).

H. Issue I(b)(2) – Oregon-regulated REC programs

Here, we invite initial identification of programs and issue areas we need to revisit assuming that we adhere to our preliminary inclination on Issue I(a)(1)—i.e., not to require retirement of RECs associated with generation used for HB 2021 compliance nor to restrict their usage in other generic ways. We anticipate that these comments largely would inform Staff’s development of going forward work plans, but if there are discrete threshold issues that would facilitate future Staff-led processes, we are open to including them in Phase II.

I. Issue I(b)(3) - Early compliance incentives

We recognize that early compliance incentives must be addressed well before HB 2021’s compliance target dates to be meaningful and the opportunity to establish performance incentives that will motivate utilities to control costs and risks in their decarbonization actions. However, we question the feasibility of establishing a performance incentive framework on such an accelerated basis and, based on early CEP indications, are concerned about the likelihood of viable pathways to early 2030 compliance that justify committing resources to this effort. Moreover, to address early compliance, we first would have to establish procedures for determining compliance with the first target in 2030. With that said, there will likely be more resources for this work, as well as a more serious possibility of achieving early compliance, with respect to the 2035 and 2040 targets.

While the development of compliance determination procedures and the generic discussion of early compliance incentives may be better suited for initial development in a Staff-led stakeholder process focused on 2035 and 2040 targets, we invite feedback on how we could consider early compliance incentives narrowly enough to be feasible in the near-term.

J. Issue I(b)(4) – Other issues

Again, the purpose of Phase II would be to provide Commission guidance on threshold issues whose resolution would make upcoming Staff-led HB 2021 implementation proceedings more efficient, including those discussed below. We invite concrete suggestions for additional issues on which early guidance could facilitate Staff-led work commencing in 2024.

III. CONNECTION BETWEEN DOCKET UM 2273 AND FUTURE STAFF-LED PROCEEDINGS

Several implementation areas identified in docket UM 2273 scoping comments are anticipated to be addressed through Staff-led investigations following review of the initial round of CEPs. Staff-led investigations and informal rulemaking are better suited than this docket for efficient gathering and synthesis of large amounts of stakeholder feedback

on complex, inter-related policy issues, and for negotiations to present areas of consensus and remaining disputed issues to the Commission for decision.

Here, we address two significant areas in which we anticipate Staff-led work, though we leave the timing, resourcing, and prioritization of this work to Staff’s discretion. One area of work anticipated for 2024 is planning and procurement procedures. This potentially includes, among other things, evaluating ways to streamline and modernize planning and procurement rules to reflect today’s context and the needs of HB 2021; incorporating small-scale and community-based renewable energy procurement; maintaining or improving opportunities for competition; and revising administrative rules to incorporate modernized IRP guidelines that address HB 2021 and the Climate Protection Program.

Another broad area for future Staff-led work is addressing HB 2021’s impacts on the voluntary customer program landscape, including issues related to accounting, competitiveness, and crediting/pricing mechanisms. Utility-identified issues related to code-of-conduct changes in HB 2021—too broad and amorphous for this investigation—may find relevance in this area of Staff-led work.

As HB 2021 progresses, Staff may identify and prioritize other areas of implementation work, including procedures for compliance determination, cost cap and reliability exception methodologies, and others. We explain below why we have chosen not to take up some of these issues in docket UM 2273. We welcome Staff seeking Commission input as it prioritizes Staff-led implementation tasks going forward.

IV. ISSUES NOT TO BE TAKEN UP IN UM 2273

A. Exceptions to compliance (reliability, unplanned emissions, cost cap)

We understand that, in planning for compliance, it would be helpful to understand fully the contours of HB 2021’s exceptions to compliance. However, reliability, cost, and unplanned emissions issues may arise in many different permutations and are difficult to address solely on the basis of hypotheticals. Further factual development through review of at least one round of CEPs is necessary to inform what kind of Commission guidance would be meaningful and not overly narrow. Moreover, as with the baseline compliance procedures themselves (i.e., the procedures for determining compliance in 2030), we regard a Staff-led stakeholder process as a superior starting point for fully addressing the contours of these issues.

We have identified for Phase I(b), however, some discrete, threshold interpretation issues relating to the HB 2021 cost cap where we see that early Commission guidance could provide important near-term guidance for the next round of CEPs and make any future Staff-led stakeholder processes on cost cap issues more targeted and efficient. There may be similar issues regarding reliability and unplanned emissions as well, and we have left space in Phase I(b) for interested parties to identify those for our consideration.

B. Further development of CBIs

Further development of community benefit indicators (CBIs) is important as HB 2021 progresses. However, as with the above issues, we conclude that review and reaction to initial CBIs, including direction for adaptation in the next round of CEPs, is better left to individual CEP review dockets and then, potentially, inclusion in future Staff-led work. However, if there are threshold issues of interpretation or guidance important to advancing CBIs, we welcome parties identifying those in Phase I(b).

Made, entered, and effective Jun 5, 2023.

Megan W. Decker

Megan W. Decker
Chair

Letha Tawney

Letha Tawney
Commissioner



Mark R. Thompson

Mark R. Thompson
Commissioner