IN THE SUPREME COURT OF THE STATE OF OREGON

PAUL COSGROVE, Petitioner, v. ELLEN F. ROSENBLUM, Attorney General, State of Oregon, Respondent.	Case No. **PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL** Initiative Petition 73 (2016)

BALLOT TITLE CERTIFIED
January 26, 2016
Chief Petitioners: Nicholas Blosser and Margaret Ngai

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I. PETITIONER'S INTEREST IN THIS MATTER

Petitioner Paul Cosgrove is an elector of this State, a person dissatisfied with the ballot title that is the subject of this action, and adversely affected by Respondent's actions. Petitioner timely submitted written comments concerning the draft ballot title and has standing to seek review pursuant to ORS 250.085(2).[1]

The ballot title contains one fundamental flaw: use of the term "renewable sources." This term should be replaced with the correct term – "qualifying electricity" – or, alternatively, "renewable" should be put in quotation marks to indicate that IP 73 uses a special definition.

II. THE INITIATIVE

IP 73 would impact both large for-profit utilities and smaller public and not-for-profit utilities that deliver over 3% of retail electricity sales. Specifically, Section 3 would prohibit all coal-fired electricity sales by 2030, or the year in which the resource was fully depreciated, whichever is earlier. Section 4 would increase the Renewable Portfolio Standard ("RPS") requirement that 25% of electricity come from "qualifying electricity" by 2025, to 50% by 2040 - essentially doubling the compliance standard. The interim performance obligations

[1] A copy of IP 73 is attached as Exhibit 1; the draft ballot title is attached as Exhibit 2; Petitioner's comments are attached as Exhibit 3; the Attorney General's explanatory letter is attached as Exhibit 4; and the certified ballot title is attached as Exhibit 5.

are increased from 20% to 22% by 2020; from 25% to 30% by 2025; 40% by 2030, and 45% by 2035.

Section 6 codifies the definition of "renewable energy certificate" currently provided by rule in OAR 330-160-0015. Section 7 states that RECs issued after the effective date of the measure "that are not used by an electric utility or electricity service supplier to comply with a renewable portfolio standard in the calendar year in which the certificates were issued may be banked and carried forward up to the three compliance years immediately following the compliance year in which the renewable energy certificates were issued for the purpose of complying with a renewable portfolio standard in one of those three subsequent compliance years." In other words, RECs would expire three compliance years after issuance. Currently, RECs do not expire; thus, this proposed limitation on the use of RECs would be a significant change that would greatly impact the REC market and consumer-owned utilities' ability to comply with the RPS.

Section 9 requires the director of the Department of Consumer and Business Services to periodically review and update the state building code so that by 2032 the "energy consumption standards" for new buildings is set at an amount that is 65% less that the 2014 standard.[2]

[2] Because "energy consumption standards" is undefined, Petitioner agrees with Respondent that the phrase should be followed by the word "(undefined") in the ballot title.

III. ARGUMENTS AND AUTHORITIES

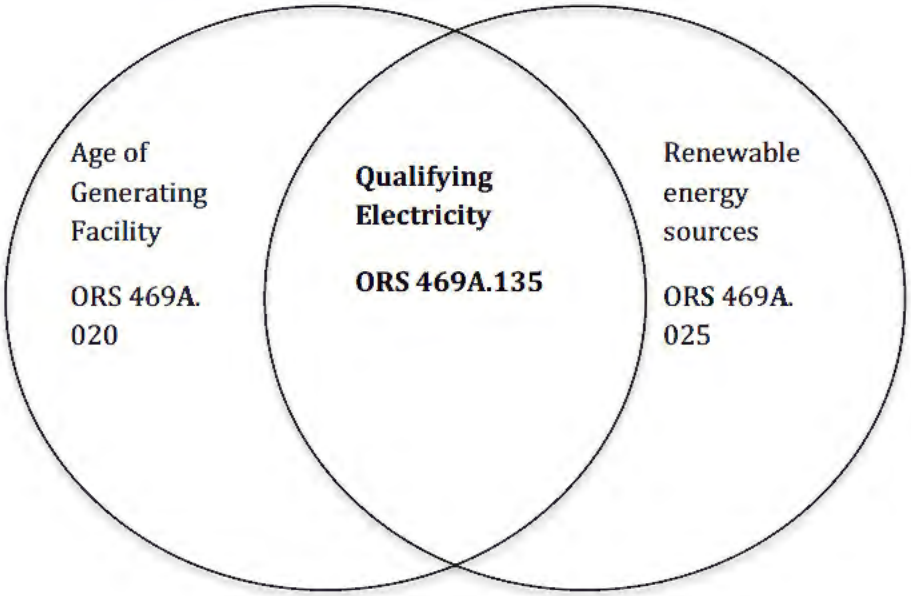
A. The Caption

The caption does not reasonably identify the subject matter of the measure as required by ORS 250.035(2)(a) because the term "renewable sources" is inaccurate and misleading. The measure increases the percentage of "qualifying electricity" that affected utilities must sell to consumers. Section 4. In the certified ballot title's caption and result statements, Respondent refers to "qualifying electricity" as "renewable sources;" however, "qualifying electricity is not the same as "renewable sources." Pursuant to ORS 469A.010, to be "qualifying electricity," the following requirements must be met:

- It must be from a "renewable energy source."
    - Only certain types of natural energy are "renewable energy sources." ORS 469A.025.
- It must be generated by a facility that "meets the requirements of ORS 469A.020."
    - ORS 469A.020 pertains to the age of the generating facility.

Therefore, not all "renewable energy sources" qualify as "qualifying electricity." For example, electricity this is generated from a permissible type of energy (such as wind, solar, geothermal, hydro) is not "qualifying electricity" if it is generated by a facility that does not meet the age requirements. Thus, "qualifying

electricity" and "renewable energy sources" - shorted by Respondent to "renewable sources" – are significantly different and the terms are not interchangeable, as illustrated below.



The caption should properly refer to "qualifying electricity;" however, if the term "renewable sources" is used, the word "renewable" should be put in quotation marks to indicate that the measure uses a special definition. The word "renewable" has a positive connotation and commonly refers to a natural, sustainable source of energy. "Renewable" is defined as "a natural resource or source of energy, not depleted when used." http://www.oxforddictionaries.com/us/definition/american_english/renewable. However, the RPS excludes many types of electricity produced from natural sources. See Exhibit 6. Adding to the confusion, the types of energy included in

IP 72's definition of "renewable energy source" differ from the types of "renewable energy" listed in ORS 469B.250(3), which includes biomass, biogas, and hydroelectric, without limitation.

Because the initiative's definition of "renewable" does not comport with the commonly understood and broader definition, or even with other statutory references to "renewable," if used the word should be placed in quotation marks and followed by the parenthetical "(defined)." See Carley/Towers v. Myers, 340 Or 222, 229, 132 P3d 651, 655-56 (2006) ("this court has approved the use of specially defined terms in quotation marks, followed by the word 'defined' in parentheses, to signal that the proposed measure specially defines the terms and uses it in that specially defined sense"); Hunnicutt v. Myers, 340 Or 83, 86, 127 P3d 1182 (2006) (illustrating principle). Failure to alert voters to the special, narrow definition renders the caption overinclusive and will likely cause voters to mistakenly believe that all types of natural energy may be used to comply with the measure's renewable requirements. See Brady v. Kroger, 347 Or 518, 524, 225 P3d 36 (2009) (caption that was overinclusive did not comply with statutory requirements).

Respondent declined to use the term "qualifying electricity" in the caption because "'qualifying electricity' [] encompasses 'renewable energy sources.'" Exhibit 4 at 2. However, as illustrated above, the reverse is true:

"qualifying electricity" is a subset of "renewable energy source." The terms have significantly different statutory meanings and, therefore, are not interchangeable.

Respondent also declined to use the term "qualifying electricity" because it "is not a phrase that most voters are likely to understand." Exhibit 4 at 2. Petitioner agrees, and the appropriate remedy for that is to put the term in quotation marks and alert voters that the term is "defined" by current law and the measure. The remedy is not to use a term that voters will understand but that is overbroad and misleading.

In response to Petitioner's alternative suggestion, Respondent declined to put "renewable" in quotation marks because "use of quotation marks might inaccurately suggest to voters that the proposed measure defines the pertinent phrase, when in fact the legislature already has defined 'renewable energy sources.'" Exhibit 4 at 2 (emphasis in original). This argument should be rejected because the initiative does define "renewable energy source." Section 6 of IP 72 provides: "(10) (11) 'Renewable energy source' means a source of electricity described in ORS 469A.025." The fact that the measure adopts and uses a special definition that also exists in current law does not alleviate the need to alert voters to that special definition. The purpose of using quotation marks is to let voters know that a term has a special definition – one that might differ

from their own definition – and that the measure "uses it in that specially defined sense." Carley/Towers v. Myers, 340 Or at 229. Voters should not be left in the dark regarding IP 72's definition of "renewable" simply because that definition also exists in current law.

For these foregoing reasons, Petitioner respectfully requests the Court to require modification of the caption so the term "qualifying electricity" is used or, alternatively, "renewable," as currently used in the caption, is put in quotation marks.

B. The Result Statements

The vote result statements do not reasonably identify the result of the measure if approved, as required by ORS 250.035(2)(b), and disapproved, as required by ORS 250.035(2)(c), due to the problems identified in the caption. As discussed above, either the term "qualifying electricity" should be used or, alternatively, "renewable" as used in the phrase "renewable sources" should be put in quotation marks.

IV. CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that the Court declare that the certified ballot title does not substantially comply with ORS 250.035 and refer the ballot title to the Attorney General for modification.

Respectfully submitted this 9th day of February, 2016.

GIBSON LAW FIRM, LLC

By: /s/ Jill Gibson
Jill Gibson, OSB #973581

Attorneys for Petitioner

Section 1. Sections 2 and 3 are added to and made a part of ORS Chapter 757.

Section 2. As used in this section:

(a) "Allocation of electricity" means the resources used to provide electricity supply, and the costs and benefits of providing electricity supply, that are assigned by an electric company to retail electricity consumers located in this State for the purpose of setting electricity rates.

(b) "Coal-fired resource" means a facility that uses coal-fired units, or that uses units fired in whole or in part by coal-fired feedstock, to generate electricity. "Coal fired resource" does not include coal-fired generation that may be included as part of a limited duration wholesale power purchase for immediate delivery made by an electric company for which the source of the power is not known.

(c) "Electric company" has the meaning given that term in ORS 757.600.

(d) "Electricity supply" means all energy, capacity and other services supplied to and included in the electricity rates of retail electricity consumers in this State.

Section 3.

(1) An electric company shall eliminate all coal-fired resources from its electricity supply on or before January 1, 2030 or by December 31 in the year in which a coal-fired resource is fully depreciated, whichever is earlier; for purposes of this section, a unit shall be considered fully depreciated based on the schedule established by the Public Utility Commission as of October 5, 2015 for purposes of establishing rates for Oregon retail electricity consumers of the electric company.

(2) This section applies only to the allocation of electricity to retail electricity consumers located in this State.

INCREASING RENEWABLE ELECTRICITY REQUIREMENTS

Section 4. ORS 469A.052 is amended as follows:

(1) The large utility renewable portfolio standard imposes the following requirements on an electric utility that makes sales of electricity to retail electricity consumers in an amount that equals three percent or more of all electricity sold to retail electricity consumers:

(a) At least five percent of the electricity sold by the utility to retail electricity consumers in each of the calendar years 2011, 2012, 2013 and 2014 must be qualifying electricity;

(b) At least 15 percent of the electricity sold by the utility to retail electricity consumers in each of the calendar years 2015, 2016, 2017, 2018 and 2019 must be qualifying electricity;

(c) At least ~~20~~**22** percent of the electricity sold by the utility to retail electricity consumers in each of the calendar years 2020, 2021, 2022, 2023 and 2024 must be qualifying electricity; ~~and~~

(d) At least ~~25~~**30** percent of the electricity sold by the utility to retail electricity consumers in **each of the** calendar ~~year~~ **years** 2025 ~~and subsequent calendar years~~**, 2026, 2027, 2028 and 2029** must be qualifying electricity.~~.~~**;**

(e) At least 40 percent of the electricity sold by the utility to retail electricity consumers in each of the calendar years 2030, 2031, 2032, 2033 and 2034 must be qualifying electricity;

(f) At least 45 percent of the electricity sold by the utility to retail electricity consumers in each of the calendar years 2035, 2036, 2037, 2038 and 2039 must be qualifying electricity; and

(g) At least 50 percent of the electricity sold by the utility to retail electricity consumers in calendar year 2040 and subsequent calendar years must be qualifying electricity.

(2) If, on June 6, 2007, an electric utility makes sales of electricity to retail electricity consumers in an amount that equals less than three percent of all electricity sold to retail electricity consumers, but in any three consecutive calendar years thereafter makes sales of electricity to retail electricity consumers in amounts that average three percent or more of all electricity sold to retail electricity consumers, the utility is subject to the renewable portfolio standard described in subsection (3) of this section. The utility becomes subject to the standard described in subsection (3) of this section in the calendar year following the three-year period during which the utility makes sales of electricity to retail electricity consumers in amounts that average three percent or more of all electricity sold to retail electricity consumers.

(3) An electric utility described in subsection (2) of this section must comply with the following renewable portfolio standard:

(a) Beginning in the fourth calendar year after the calendar year in which the utility becomes subject to the standard described in this subsection, at least five percent of the electricity sold by the utility to retail electricity consumers in a calendar year must be qualifying electricity;

(b) Beginning in the 10th calendar year after the calendar year in which the utility becomes subject to the standard described in this subsection, at least 15 percent of the electricity sold by the utility to retail electricity consumers in a calendar year must be qualifying electricity;

(c) Beginning in the 15th calendar year after the calendar year in which the utility becomes subject to the standard described in this subsection, at least ~~20~~**22** percent of the electricity sold by the utility to retail electricity consumers in a calendar year must be qualifying electricity; ~~and~~

(d) Beginning in the 20th calendar year after the calendar year in which the utility becomes subject to the standard described in this subsection, at least ~~25~~ **30** percent of the electricity sold by the utility to retail electricity consumers in a calendar year must be qualifying electricity.~~.~~**;**

(e) Beginning in the 25th calendar year after the calendar year in which the utility becomes subject to the standard described in this subsection, at least 40 percent of the electricity sold by the utility to retail electricity consumers in a calendar year must be qualifying electricity;

(f) Beginning in the 30th calendar year after the calendar year in which the utility becomes subject to the standard described in this subsection, at least 45 percent of the electricity sold by the utility to retail electricity consumers in a calendar year must be qualifying electricity; and

(g) Beginning in the 35th calendar year after the calendar year in which the utility becomes subject to the standard described in this subsection, at least 50 percent of the electricity sold by the utility to retail electricity consumers in a calendar year must be qualifying electricity.

Section 5. ORS 469A.075 is amended as follows:

(1) An electric company that is subject to a renewable portfolio standard shall develop an implementation plan for meeting the requirements of the standard and file the plan with the Public Utility Commission. Implementation plans must be revised and updated at least once every two years.

(2) An implementation plan must at a minimum contain:

(a) Annual targets for acquisition and use of qualifying electricity; ~~and~~

(b) The estimated cost of meeting the annual targets, including the cost of transmission, the cost of firming, shaping and integrating qualifying electricity, the cost of alternative compliance payments and the cost of acquiring renewable energy certificates~~.~~**; and**

(c) Procurement options for meeting the requirements of the renewable portfolio standard and minimizing the risk of exceeding the cost limitation requirements set forth in ORS 469A.100.

(3) The commission shall acknowledge the implementation plan no later than six months after the plan is filed with the commission. The commission may acknowledge the plan subject to conditions specified by the commission.

(4) The commission shall adopt rules:

(a) Establishing requirements for the content of implementation plans;

(b) Establishing the procedure for acknowledgment of implementation plans under this section, including provisions for public comment; and

(c) Providing for the integration of the implementation plan with the integrated resource planning guidelines established by the commission and in effect on June 6, 2007.

(5) The implementation plan filed under this section may include procedures that will be used by the electric company to determine whether the costs of constructing a facility that generates electricity from a renewable energy source, or the costs of acquiring bundled or unbundled renewable energy certificates, are consistent with the standards of the commission relating to least-cost, least-risk planning for acquisition of resources.

Section 6. ORS 469A.005 is amended as follows:

As used in ORS 469A.005 to 469A.210:

(1) "Banked renewable energy certificate" means a bundled or unbundled renewable energy certificate that is not used by an electric utility or electricity service supplier to comply with a renewable portfolio standard in a calendar year and that is carried forward for the purpose of compliance with a renewable portfolio standard in a subsequent year.

(2) "BPA electricity" means electricity provided by the Bonneville Power Administration,

including all electricity from the Federal Columbia River Power System hydroelectric projects and other electricity acquired by the Bonneville Power Administration by contract.

(3) "Bundled renewable energy certificate" means a renewable energy certificate for qualifying electricity that is acquired:

(a) By an electric utility or electricity service supplier by a trade, purchase or other transfer of electricity that includes the certificate that was issued for the electricity; or

(b) By an electric utility by generation of the electricity for which the certificate was issued.

(4) "Compliance year" means the calendar year for which the electric utility or electricity service supplier seeks to establish compliance with the renewable portfolio standard applicable to the utility or supplier in the compliance report submitted under ORS 469A.170.

(5) "Consumer-owned utility" means a municipal electric utility, a people's utility district organized under ORS chapter 261 that sells electricity or an electric cooperative organized under ORS chapter 62.

(6) "Electric company" has the meaning given that term in ORS 757.600.

(7) "Electric utility" has the meaning given that term in ORS 757.600.

(8) "Electricity service supplier" has the meaning given that term in ORS 757.600.

(9) "Qualifying electricity" means electricity described in ORS 469A.010.

(10) "Renewable energy certificate" means a unique representation of all environmental, economic, and social benefits associated with the generation of electricity from renewable energy sources that produce qualifying electricity. One renewable energy certificate is created in association with the generation of one megawatt-hour (MWh) of qualifying electricity. While a renewable energy certificate is always directly associated with the generation of one MWh of electricity, transactions for renewable energy certificates may be conducted independently of transactions for the associated electricity.

~~(10)~~ **(11)** "Renewable energy source" means a source of electricity described in ORS 469A.025.

~~(11)~~ **(12)** "Retail electricity consumer" means a retail electricity consumer, as defined in ORS 757.600, that is located in Oregon.

~~(12)~~ **(13)** "Unbundled renewable energy certificate" means a renewable energy certificate for qualifying electricity that is acquired by an electric utility or electricity service supplier by trade, purchase or other transfer without acquiring the electricity for which the certificate was issued.

Section 7. ORS 469A.140 is amended as follows:

(1) Renewable energy certificates may be traded, sold or otherwise transferred.

(2) Renewable energy certificates **with issuance dates prior to the effective date of this Act** that are not used by an electric utility or electricity service supplier to comply with a renewable portfolio standard in a calendar year may be banked and carried forward indefinitely for the purpose of complying with a renewable portfolio standard in a subsequent year. **Except as provided in ORS 469A.020(5) and (6), renewable energy certificates issued after the effective date of this Act that are not used by an electric utility or electricity service**

supplier to comply with a renewable portfolio standard in the calendar year in which the certificates were issued may be banked and carried forward up to the three compliance years immediately following the compliance year in which the renewable energy certificates were issued for the purpose of complying with a renewable portfolio standard in one of those three subsequent compliance years. For the purpose of complying with a renewable portfolio standard in any calendar year:

(a) Banked renewable energy certificates must be used, up to the limit imposed by ORS 469A.145, before other certificates are used; and

(b) Banked renewable energy certificates with the oldest issuance date must be used to comply with the standard before banked renewable energy certificates with more recent issuance dates are used.

(3) An electric utility or electricity service supplier is responsible for demonstrating that a renewable energy certificate used to comply with a renewable portfolio standard is derived from a renewable energy source and that the utility or supplier has not used, traded, sold or otherwise transferred the certificate.

(4) The same renewable energy certificate may be used by an electric utility or electricity service supplier to comply with a federal renewable portfolio standard and a renewable portfolio standard established under ORS 469A.005 to 469A.210. An electric utility or electricity service supplier that uses a renewable energy certificate to comply with a renewable portfolio standard imposed by any other state may not use the same certificate to comply with a renewable portfolio standard established under ORS 469A.005 to 469A.210.

INCREASING ENERGY EFFICIENCY FOR NEW CONSTRUCTION

Section 8. ORS 455.505 is amended as follows:

The Director of the Department of Consumer and Business Services, subject to the approval of the appropriate advisory boards, shall adopt rules establishing uniform energy conservation standards for inclusion under the state building code. The director shall design the energy conservation standards to increase energy efficiency in buildings that are newly constructed, reconstructed, altered or repaired. The director shall periodically review the energy conservation standards of the state building code and propose updates to the standards as the director considers necessary to reflect changing technology in energy efficiency and to encourage continual improvements in building energy efficiency in accordance with ORS 455.511**(1), (2) and (3). Not later than July 1, 2017, and at least every three years thereafter, the director shall review the energy conservation standards of the state building code and propose updates to the standards to ensure compliance with the energy efficiency requirements of ORS 455.511(4).** In reviewing the energy conservation standards, the director shall consider the target standards described in the Architecture 2030 organization's 2030 Challenge and may consider other available nationally recognized energy conservation standards.

Section 9. ORS 455.511 is amended as follows:

(1) As used in this section, "energy efficiency" means the use of construction and design standards, construction methods, products, equipment and devices to increase efficient use of, and reduce consumption of, electricity, natural gas and fossil fuels in buildings undergoing new construction, reconstruction, alteration or repair.

(2) The Director of the Department of Consumer and Business Services, after consultation with the State Department of Energy and subject to the approval of the appropriate advisory boards,

shall adopt amendments to the state building code under ORS 455.030 to increase energy efficiency in buildings that are newly constructed, reconstructed, altered or repaired. In adopting the amendments, the director shall consider generally accepted model codes, products and product standards, the Reach Code adopted under ORS 455.500 and other available data to evaluate codes and standards that promote energy efficiency in buildings.

(3) The director, in consultation with the appropriate advisory boards, shall develop a schedule for the periodic review of energy efficiency standards and shall establish goals for increasing the level of energy conservation achieved by the use of energy efficiency standards contained in the state building code and the Reach Code. In establishing goals and the schedule for periodic review of standards under this section, the director shall consider the publication schedule of generally accepted construction codes and standards. If the director determines that the adopted review schedule or energy efficiency goals are not practicable for economic or technical reasons, the director may amend the schedule or goals as the director considers appropriate.

(4) The director shall require updates to the energy efficiency standards of the state building code to ensure a 65% reduction in the annual net energy consumption of newly constructed buildings by 2032, as compared to the requirements of the 2014 state building code. In establishing the code changes required by this section, the director shall consider generally accepted construction codes and standards.

Section 10. If any provision of this 2016 Act is held invalid for any reason, all remaining provisions of this Act shall remain in place and be given full force and effect.

DRAFT BALLOT TITLE

Increases percentage of electricity required from renewable sources; reduces new buildings' permissible net energy consumption

Result of "Yes" Vote: "Yes" vote increases percentage of electricity sales required from renewable sources; renewable energy certificates (RECs) expire; will reduce permissible net energy consumption for new buildings.

Result of "No" Vote: "No" vote retains current minimum percentages for electricity sales from renewable sources; RECs do not expire; retains current net energy consumption standard for new buildings.

Summary: If a utility sells at least 3% of all electricity sold to consumers, current law generally requires—for 2020-2024—at least 20% of utility's electricity sales to be "qualifying electricity," which includes electricity from "renewable energy sources" (defined by current law); subsequently, required minimum is 25%; to meet minimums, may use RECs (RECs are issued to utilities that produce more qualifying electricity than required, may be sold/transferred between utilities). Proposed measure increases required minimum: 22% for 2020-2024, 30-45% for 2035-2039, 50% subsequently; RECs would expire after three years; electric companies must phase out coal-generated electricity sales by 2030; would reduce, by 2032, new buildings' permissible net energy consumption by 65%. Other provisions.

GIBSON
LAW FIRM

January 8, 2016

VIA EMAIL – irrlistnotifier@sos.state.or.us

The Honorable Jeanne Atkins
Secretary of State
Elections Division
255 Capitol Street NE, Ste. 501
Salem, OR 97310-0722

Re: Public Comment on Initiative Petition 73 (2016)

Dear Secretary Atkins,

I represent Paul Cosgrove, an elector in the State of Oregon who wishes to comment on the draft ballot title for IP 73 (2016). Thank you for the opportunity to provide comments.

I. INTRODUCTION

A. Current Law

The 2007 Legislature created a Renewable Portfolio Standard (RPS) that requires utilities to provide a certain percentage of "qualifying electricity" as part of their retail electricity sales. *See* ORS ch 469A. Specifically, by 2025 "qualifying electricity" must comprise at least 25% of the electricity sold by utilities that deliver over 3% of the retail electricity sales in Oregon. ORS 469A.052. The RPS also requires interim performance obligations of 5% in 2011; 15% in 2015; and 20% in 2020.

The Legislative Assembly established strict requirements regarding what constitutes "qualifying electricity." In order for electricity to count towards a utility's RPS mandate, two statutory conditions must be met. First, "electricity may be used to comply with a renewable portfolio standard only if the electricity is generated by a facility that becomes operational on or after January 1, 1995." ORS 469A.020(1). Second, the electricity must be generated utilizing certain allowable *"types* of renewable energy." ORS 469A.025(1) (emphasis added). Only four types of renewable energy – wind, solar, wave, and geothermal – qualify as "renewable" without any additional conditions. *Id.* Although electricity generated by hydropower and biomass is commonly considered to be renewable, these types of energy sources are not "renewable" for purposes of complying with the RPS unless certain requirements are met. *See* ORS 469A.025(3), (4). Due to the Legislature's restrictions, hydropower produced from 31 Bonneville Power Administration facilities does not qualify as renewable energy. *See* Exhibit 1. Likewise, biomass is not "renewable" if it includes wood that has been treated with certain preservatives. ORS 469A.025(3).

The RPS affects both large for-profit utility companies and small public or not-for-profit utility companies, although the differences between the two are significant. Oregon has 37 Consumer Owned Utilities (COUs), which are either operated by municipalities or public utility districts, or are not-for-profit rural electric cooperatives. These COUs collect rates sufficient to cover their costs of operations. COUs are locally governed by elected boards and governments. COUs mostly serve rural areas and are not generally large enough to invest in their own generation facilities; thus they must purchase their power from others. Currently, Oregon COUs purchase 85% of their power under Federal Hydro System (BPA) contracts. Importantly, COUs generate no energy from coal. Oregon's largest COU is Eugene Water & Electric, which provides approximately 4.97% of the state's retail electricity sales. http://www.puc.state.or.us/docs/statbook2014WEB.pdf). The next largest, Umatilla Electric Cooperative, provides approximately 2.86% of the state's retail electricity sales, but is expected to cross the 3% threshold next year, thus requiring it to meet the same renewable requirements as a large for-profit utility. *See Id.*

In contrast, Oregon's largest and second largest utilities are Investor Owned Utilities (IOUs) and they provide 37.4% and 27.5% of the state's retail electricity sales, respectively. *Id.* IOUs are business organizations managed to provide profits for their stockholders and are governed by boards elected by stockholders. Oregon's IOUs own and operate generating facilities and are allowed to earn a rate of return of 8-10% on these capital investments. 91% of Oregon's electric energy sales derived from coal come from IOUs' combined power resource mix.

A key feature of the RPS was the establishment of Renewable Energy Certificates (RECs), a system that allows utilities to comply with the renewable mandates without having to actually produce electricity generated from the required sources. Instead, utilities are allowed to buy RECs, which are tradable commodities that represent the "environmental, economic, and social benefits" associated with one megawatt-hour of electricity generated by certain renewable energy sources. OAR 330-160-0015. RECs are at the heart of Oregon's renewable energy programs, and in recognition of the difficulties confronting COUs to meet compliance mandates, the 2014 Legislature passed HB 4126 to expand the use of RECs by COUs, such as Umatilla Electric Cooperative.

B. IP 73

IP 73 would impact both large for-profit utilities and smaller public and not-for-profit utilities that deliver over 3% of retail electricity sales. Specifically, Section 3 would prohibit all coal-fired resources by 2030, or the year in which the resource was fully depreciated, whichever is earlier. Section 4 would increase the RPS requirement that 25% of electricity must come from renewable sources by 2025, to 50% by 2040 - essentially doubling the compliance standard. And the interim performance obligations are increased from 20% to 22% by 2020; from 25% to 30% by 2025; 40% by 2030, and 45% by 2035.

Section 6 codifies the definition of "renewable energy certificate" currently provided by rule in OAR 330-160-0015. Section 7 states that RECs issued after the effective date of the measure "that are not used by an electric utility or electricity service supplier to comply with a renewable portfolio standard in the calendar year in which the certificates were issued may be banked and carried forward up to the three compliance years immediately following the compliance year in which the renewable energy certificates were issued for the purpose of complying with a renewable portfolio standard in one of those three subsequent compliance years." In other words, RECs would expire three compliance years after issuance. Currently, RECs do not expire; thus, this proposed limitation on the use of RECs would be a significant change that would greatly impact the REC market.

Section 8 requires the director of the Department of Consumer and Business Services to periodically review and update the state building code so that by 2032 the energy consumption standard for new buildings is set at an amount that is 65% less that the 2014 standard.

II. DRAFT BALLOT TITLE

The Attorney General has proposed the following ballot title for IP 73:

Increases percentage of electricity required from renewable sources; reduces new buildings' permissible net energy consumption

Result of "Yes" Vote: "Yes" vote increases percentage of electricity sales required from renewable sources; renewable energy certificates (RECs) expire; will reduce permissible net energy consumption for new buildings.

Result of "No" Vote: "No" vote retains current minimum percentages for electricity sales from renewable sources; RECs do not expire; retains current net energy consumption standard for new buildings.

Summary: If a utility sells at least 3% of all electricity sold to consumers, current law generally requires-for 2020-2024-at least 20% of utility's electricity sales be "qualifying electricity," which includes electricity from "renewable energy sources" (defined by current law); subsequently, required minimum is 25%; to meet minimums, utility may use RECs (RECs are issued to utilities that produce more qualifying electricity than required, may be sold/transferred between utilities). Proposed measure increases required minimum to: 22% for 2020-2024, 30-45% for 2035-2039, 50% subsequently. RECs would expire after three years; electric companies must phase out coal-generated electricity sales by 2030; would reduce, by 2032, new buildings' permissible net energy consumption by 65%. Other provisions.

III. COMMENTS ON THE DRAFT BALLOT TITLE

A. The Caption

Under ORS 250.035(2)(a), the caption is limited to fifteen words and must "reasonably identif[y] the subject matter" of a measure - described in case law as its "actual major effect" or, if more than one major effect, all effects describable within the available word limit. *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011); *see also Greenberg v. Myers*, 340 Or 65, 69, 127 P3d 1192 (2006) (Attorney General may not select and identify in caption only one of multiple subjects, such that caption understates scope of subject matter). To ascertain the subject matter of a measure, the Oregon Supreme Court typically considers the "changes that the proposed measure would enact in the context of existing law." *Rasmussen v. Kroger* (S059261), 350 Or 281, 285, 253 P3d 1031 (2011); *see also Rasmussen v. Kroger*, 351 Or 358, 361, 266 P3d 87 (2011) (when major effect would substantively change existing law, ballot title should inform voters of scope of change). Because the caption is the "cornerstone" of the ballot title, it must identify the subject matter of the proposed measure in terms that will "inform potential petition signers and voters of the sweep of the measure." *Terhune v. Myers*, 342 Or 475, 479, 154 P3d 1284 (2007); *see also Greene v. Kulongoski*, 322 Or 169, 174-75, 903 P2d 366 (1995) (explaining that caption may not obscure measure's effect or make it difficult for voters to understand measure's subject).

We believe the draft caption fails to comply with the above standards because of the term "renewable sources." IP 73 does not increase the percentage of electricity required from "renewable sources;" it increases the percentage of electricity required from "qualifying electricity." *See, e.g.,* Section 4(g) ("At least 50 percent of the electricity sold by the utility to retail electricity consumers in calendar year 2040 and subsequent calendar years must be *qualifying electricity*.) (emphasis added). As described above, "qualifying electricity" is defined as electricity that complies with the facility age restrictions contained in ORS 469A.020 and the energy source restrictions contained in ORS 469A.025. Thus, describing "qualifying electricity" as "renewable sources" is misleading and inaccurate. To correct this deficiency, the caption should refer to "qualifying electricity" instead of "renewable sources." Additionally, the term "qualifying electricity" should be followed by the parenthetical "(defined). *See Carley/Towers v. Myers*, 340 Or 222, 132 P3d 651, 655-56 (2006) ("this court has approved the use of specially defined terms in quotation marks, followed by the word 'defined' in parentheses, to signal that the proposed measure specially defines the terms and uses it in that specially defined sense"); *Hunnicutt v. Myers,* 340 Or 83, 86, 127 P3d 1182 (2006) (illustrating principle).

Alternatively, if the caption continues to use the term "renewable resources," the above-described deficiency may be corrected by putting the term in quotation marks followed by "(defined)." Because of the strict limitations on the types of energy sources that may be used to comply with the RPS, the term "renewable" without quotation marks renders the caption misleading and overinclusive. "Renewable" is a trendy word often used by the general public to refer to something that is from a natural source. "Renewable" is defined as "a natural resource of source of energy, not depleted when used." http://www.oxforddictionaries.com/us/definition/american_english/renewable. However, as used

in IP 73, "renewable sources" refers to the specifically defined sources of energy listed in ORS 469A.025. Section 6(11). An energy source not included in this definition is not considered "renewable" even if it is otherwise a natural source of energy that is not depleted when used. For example, hydropower produced from older dams and biomass that includes wood treated with certain preservatives are not "renewable." *See* Exhibit 1. Using quotation marks will alert voters that the term has a specific definition that may differ from their own definition.

Also, the caption overstates IP 73's effect on energy consumption. The captions states that the initiative "reduces new buildings' permissible net energy consumption;" however, the initiative would only require standards that set a goal of such energy reduction. The caption is written in a manner that could cause voters to mistakenly believe that new buildings would be required to reduce net energy consumption, but that is an overstatement. Reduced energy consumption would be a goal of the new building code, but the code cannot "ensure" such reduction and no mechanism is included in the initiative to enforce the new standard. While the word "permissible" attempts to capture the uncertainly of the reduction, it still implies that the initiative would reduce energy consumption, and such effect is not known at this time. To correct this deficiency, the caption should clearly reflect that the initiative would only require certain standards, but would not reduce the amount of energy new buildings consume.

The following captions would comply with statutory requirements:

Increases percentage of electricity required from "qualifying electricity" (defined); Establishes stricter energy standards for buildings

Increases percentage of electricity required from "renewable sources" (defined); Establishes stricter energy standards for buildings

B. The Result of "Yes" Vote Statement

ORS 250.035(2)(b) requires a ballot title to contain a "simple and understandable statement," of not more than 25 words, explaining what will happen if the measure is approved. As the Oregon Supreme Court has observed, the "yes" vote result statement should describe "the most significant and immediate" effects of the ballot initiative for "the general public." *Novick/Crew v. Myers,* 337 Or 568, 574, 100 P.3d 1064 (2004).

IP 63's "yes" statement is also noncompliant because voters are not notified that the initiative adopts a special definition for "qualifying electricity" and "renewable resources." This will likely result in voters mistakenly believing that all types of renewable energy, as commonly understood, may be used to comply with the initiative. Additionally, as discussed above, the statement should make clear that the initiative would only require stricter standards, not reduce the amount of energy new buildings could consume.

C. The Result of "No' Vote Statement

ORS 250.035(2)(c) requires a ballot title to contain a "simple and understandable statement," of not more than 25 words, explaining what will happen if voters reject the measure. This means that the statement must explain to voters "the state of affairs" that will exist if the initiative is rejected, i.e. the status quo. Also, a "no" vote result statement should "address[ ] the substance of current law *on the subject matter of the proposed measure*" and "summarize [ ] the current law accurately." *Novick/Crew* at 577, 100 P.3d 1064 (emphasis in original).

For the reasons stated above, we believe the term "qualifying electricity" should be used followed by the word "defined;" or, alternatively, the term "renewable sources" should be put in quotation marks followed by the word "defined."

D. The Summary

ORS 250.035(2)(d) requires that a ballot title contain a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effects." The purpose of a ballot title's summary is to give voters enough information to understand what will happen if the initiative is adopted. *Whitsett v. Kroger,* 348 Or 243, 252, 230 P.3d 545 (2010).

The summary adequately describes most of IP 73; however, the sentence regarding energy consumption should be modified to adequately convey that the initiative would only require stricter standards, not reduce the amount of energy new buildings could consume.

Thank you for considering our comments to the draft ballot title.

Very truly yours,

Jill Gibson

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Attorney General

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DEPARTMENT OF JUSTICE
APPELLATE DIVISION

January 26, 2016

Jim Williams
Director, Elections Division
Office of the Secretary of State
255 Capitol St. NE, Ste. 501
Salem, OR 97310

Re: Proposed Initiative Petition — Increases Electricity Percentages Required from Renewable Sources; Reduces New Buildings' Permissible "Net Energy Consumption" (Undefined)
DOJ File #BT-73-15; Elections Division #2016-073

Dear Mr. Williams:

We have reviewed the comments submitted on the draft ballot title for the above-referenced initiative petition. We provide the enclosed certified ballot title, reflecting changes to the ballot title's caption, "yes" result statement, and summary.

This letter summarizes the comments we received, our responses to those comments, and the reasons we declined to make some of the proposed changes. ORAP 11.30(7) requires this letter to be included in the record in the event that the Oregon Supreme Court reviews the ballot title.

A. The caption

The draft ballot title's caption read:

Increases percentage of electricity required from renewable sources; reduces new buildings' permissible net energy consumption

1. Why we have not modified the first clause in the caption.

Commenter Paul Cosgrove criticizes the caption's use of the phrase "renewable sources," and suggests (as do commenters Scott Bolton and Dave Robertson) that the caption use the phrase "qualifying electricity" instead. But because "qualifying electricity"—as defined by current law—encompasses "renewable energy sources," and because "qualifying electricity" is not a phrase that most voters are likely to understand, we have decided not to make the proposed change.

In the alternative, Mr. Cosgrove suggests that if the phrase "renewable sources" is to remain in the ballot title, it should be accompanied by quotation marks. Placing the phrase in quotation marks would be inappropriate, however. First, the phrase "renewable sources" is not the precise phrase referenced in the proposed measure; instead, the measure references a longer phrase—"renewable energy sources," as used in current law. IP 72, § 6. For that reason alone, use of quotation marks would be misleading. Second, use of quotation marks might inaccurately suggest to voters that the proposed measure defines the pertinent phrase, when in fact the *legislature* already has defined "renewable energy sources." *Cf. Carley/Towers v. Myers*, 340 Or 222, 229, 132 P3d 651 (2006) ("this court has approved the use of specially defined terms in quotation marks, followed by the word 'defined' in parentheses, to signal that the proposed measure specially defines the terms"). ORS 469A.005(10) already defines "renewable energy source," and section 6 of the proposed measure—although it would require that provision to be renumbered as ORS 469A.005(*11*)—leaves that definition unchanged. For that reason also, quotation marks would be inappropriate.

Commenters Scott Bolton and Dave Robertson criticize the caption for failing to inform voters that, under the measure, utilities will be required to increase the percentage of electricity sales that derive from "qualifying electricity" only if ORS 469A.100's potential exemption to qualifying-electricity requirements is not triggered. They note that ORS 469A.100(1) exempts utilities from complying with qualifying-electricity requirements "during a compliance year to the extent that the incremental cost of compliance, the cost of unbundled renewable energy certificates and the cost of alternative compliance payments under ORS 469A.180 exceeds four percent of the utility's annual revenue requirement for the compliance year." Significantly, however, the proposed measure does not alter that aspect of current law; it leaves the current exemption in ORS 469A.100(1) undisturbed. Accordingly, the caption makes no reference to that exemption; that is, nothing requires the caption to tell voters that the measure, in increasing the required percentages of electricity sales that must come from renewable resources, leaves intact an already-existing exemption.

Commenters Bolton and Robertson also criticize the caption for failing to tell voters that not all utilities are affected by the proposed increase in the minimum amount of electricity sales that must come from qualifying electricity. They thus appear to suggest that the caption should clarify, as the summary does, that the requirements at issue apply to utilities that "sell[] at least 3% of all electricity sold to consumers" in the state. But the caption, in stating that the proposed measure "[i]ncreases percentage of electricity required from renewable sources," is accurate. That statement does not assert that the proposed increase would apply to each and every entity that produces or supplies electricity. Although the caption does not specifically identify those who must comply with the proposed increases, that is a result of the caption's 15-word limit. In any event, the summary explains that the requirements at issue apply to utilities that "sell[] at least 3% of all electricity sold to consumers."

2. Why we have modified the second clause in the caption but have not added a reference to the proposed measure's coal-related requirements.

The second clause in the caption reads, "reduces new buildings' permissible net energy consumption." That phrase describes section 9 of the proposed measure, which would amend ORS 455.511 to add the following subsection:

> (4) The director [of the Department of Consumer and Business Services] shall require updates to the energy efficiency standards of the state building code to ensure a 65% reduction in the annual net energy consumption of newly constructed buildings by 2032, as compared to the requirements of the 2014 state building code. In establishing the code changes required by this section, the director shall consider generally accepted construction codes and standards.

Mr. Cosgrove suggests that the caption "overstates IP 73's effect on energy consumption"; he asserts that rather than reducing net energy consumption, IP 73 "would only require standards that set a goal of such energy reduction." Yet the caption already accurately explains that the proposed measure would reduce the "permissible" level of net energy consumption. It thereby conveys that, whether or not builders ultimately comply with the new standards, the measure will affect the level of "net energy consumption" that is considered permissible under the law.

Commenter Nicholas Blosser asserts that the caption's description of the proposed reduction in permissible energy consumption is "incomplete and confusing," and that it uses "technical language that would be incomprehensible to most voters." Although the meaning of "net energy consumption" is not necessarily self-evident, "net energy consumption" is the phrase that section 9 of the measure uses in amending ORS 455.511, and the proposed measure does not define that phrase. Further, chapter 455 of the Oregon Revised Statutes does not appear to define the phrase. Accordingly, we have chosen to continue to use the phrase that IP 73 uses.

At the same time, we agree with commenters Bolton and Robertson that, because neither current law nor the measure defines "net energy consumption," the caption—and the rest of the ballot title—should note that the phrase is undefined. As a result, we have placed "net energy consumption" in quotation marks and noted that the phrase is undefined. To make room for the word "undefined," we have changed "increases percentage of electricity" to "increases electricity percentages."

Mr. Blosser also describes the caption as "underinclusive, because it fails to mention that [section 3 of] the Initiative requires electric utilities to phase out coal generated electricity from their electricity supplies." *See* IP 73, § 3(1) (requiring electric company to "eliminate all coal-fired resources from its electricity supply" no later than January 1, 2030). Although we have described section 3 in the summary, we were unable to do so in the caption (or in the result statements) due to the applicable word limitation. That is, if we described section 3 in the caption, we would need to omit the explanation that the measure "reduces new buildings' permissible net energy consumption." We concluded that the caption needed to refer to the reduction required by section 9 for two reasons. First, section 9 reflects a significant aspect of

the proposed measure; it affects all newly constructed buildings, and would require a 2/3 reduction in permissible "net energy consumption" over the next 16 years. Second, because section 9 affects the construction industry and those involved in it, it is quite different from the other portions of the measure, which focus on electric companies and utilities and the types of electricity that they may sell. In contrast, the measure's effect on the ability to sell coal-generated electricity can be viewed as closely related to the other portions of the measure—the portions affecting the types of electricity that electric companies and utilities can sell—that the caption's first clause (addressing electricity from "renewable sources") already refers to.

The certified caption reads:

Increases electricity percentages required from renewable sources; reduces new buildings' permissible "net energy consumption" (undefined)

B. The "yes" result statement

The draft ballot title's "yes" result statement read:

> **Result of "Yes" Vote:** "Yes" vote increases percentage of electricity sales required from renewable sources; renewable energy certificates (RECs) expire; will reduce permissible net energy consumption for new buildings.

For the same reasons recounted with respect to the caption, we have placed "net energy consumption" in quotation marks and noted that the phrase is "undefined." To make room for the word "undefined," we have changed "will reduce" to "reduces."

Each commenter offered additional criticisms of the "yes" result statement that mirror criticisms that were offered with respect to the caption. We respond to those criticisms by relying on the explanations we provided above with respect to the caption.

In addition, Mr. Bolton and Mr. Robertson suggest that the "yes" result statement should inform voters that "a result of the passage of IP 72 as written will be an increase in rates charged for electricity." But because nothing in the proposed measure or existing law necessarily compels that conclusion, we have declined to adopt their suggestion.

Mr. Blosser asserts that the "yes" result statements should not refer to the proposed limitation on using renewable energy certificates (RECs), in part because that limitation is not sufficiently significant to warrant a mention. On the one hand, it is true that the manner in which a utility can use an REC to satisfy renewable portfolio standards could be described as a "subset" of a broader subject that the proposed measure addresses—the broader subject being the percentages of electricity sales that must come from renewable energy sources. On the other hand, the measure's impact on how utilities can use RECs, and the proposed imposition of a three-year limit (compared to current law's declaration that RECs may be used "indefinitely"), is undoubtedly one of the measure's results. Consequently, the "yes" result statement appropriately refers to that impact.

Mr. Blosser argues that the phrase "renewable energy certificates (RECs) expire" is inaccurate, because it suggests that, under the proposed measure, *all* RECs would expire regardless of when they were issued. In fact, he notes, the measure would create a three-year limit only with respect to RECs that issue after the measure becomes law. Mr. Bolton and Mr. Robertson also describe the reference to RECs as "expir[ing]" as inaccurate; they assert that the purpose to which a utility is authorized to use an REC is not limited to satisfying qualifying-electricity standards, and they assert that other entities who are not bound by those standards use RECs. Thus, although IP 72 creates a limited time within which to use RECs for the purpose of meeting qualifying-electricity requirements, the measure does not dictate that RECs will "expire" with respect to any other purposes.

Significantly, however, the "yes" result statement does not expressly state that, under the proposed measure, *all* RECs would expire. Moreover, the "yes" result statement, in observing that RECs will "expire" under the measure, is accurate: Under the measure, certain certificates' ability to satisfy qualifying-electricity standards will (in contrast to current law) terminate after three years. Consequently, we have not modified the portion of the statement stating that RECs will "expire."

The certified "yes" result statement reads:

> **Result of "Yes" Vote:** "Yes" vote increases percentage of electricity sales required from renewable sources; renewable energy certificates (RECs) expire; reduces permissible "net energy consumption" (undefined) for new buildings.

C. The "no" result statement

The draft ballot title's "no" result statement read:

> **Result of "No" Vote:** "No" vote retains current minimum percentages for electricity sales from renewable sources; RECs do not expire; retains current net energy consumption standard for new buildings.

The commenters' suggestions for altering the "no" result statement mirror suggestions that we chose not to adopt with respect to the caption and "yes" result statement. We thus respond to those suggestions by relying on the responses that we articulated earlier in this letter.

The certified "no" result statement reads:

> **Result of "No" Vote:** "No" vote retains current minimum percentages for electricity sales from renewable sources; RECs do not expire; retains current net energy consumption standard for new buildings.

D. The summary

The draft ballot title's summary read:

> **Summary:** If a utility sells at least 3% of all electricity sold to consumers, current law generally requires—for 2020-2024—at least 20% of utility's electricity sales to be "qualifying electricity," which includes electricity from "renewable energy sources" (defined by current law); subsequently, required minimum is 25%; to meet minimums, may use RECs (RECs are issued to utilities that produce more qualifying electricity than required, may be sold/transferred between utilities). Proposed measure increases required minimum: 22% for 2020-2024, 30-45% for 2035-2039, 50% subsequently; RECs would expire after three years; electric companies must phase out coal-generated electricity sales by 2030; would reduce, by 2032, new buildings' permissible net energy consumption by 65%. Other provisions.

Mr. Cosgrove criticizes the summary's statement that IP 73 "would reduce, by 2032, new buildings' permissible net energy consumption by 65%," on the grounds that it fails to convey that "the initiative would require stricter standards, not reduce the amount of energy new buildings would consume." Yet the summary's description—that the measure "reduce[s] * * * new buildings' permissible net energy consumption"—mirrors section 9's text, which requires standards that will "ensure a 65% reduction in the annual net energy consumption of newly constructed buildings."

Mr. Blosser suggests that the summary should state "that current law sets minimum standards for building energy efficiency." Yet the summary already implicitly refers to any current standards that apply, by noting that the measure would reduce the permissible level of net energy consumption by 65%.

Mr. Blosser asserts that the word "sales"—in the phrase "phase[s] out coal-generated electricity sales"—is inaccurate; he argues that, under the measure, "[c]oal-generated electricity may not be provided to consumers, whether by sale or otherwise." Mr. Blosser is mistaken. Section 3(1) of the proposed measure provides that an electric company "shall eliminate all coal-fired resources from its electricity supply." But something qualifies as an "electricity supply," as defined by section 2(d), only if it constitutes energy that is "supplied to *and included in the electricity rates* of retail electricity consumers." (Emphasis added.) As a result, the measure does not necessarily prohibit electric companies from providing coal-generated electricity to consumers; it only prohibits them from doing so if they include that electricity "in the electricity rates" that consumers must pay. Accordingly, the caption accurately states that the measure "phases out coal-generated electricity *sales*," and it does not state that the measure would eliminate coal-generated electricity. (Emphasis added.)

Mr. Blosser criticizes the summary for not explaining that "under current law, there are no restrictions on the use of electricity from coal." Yet the summary accurately informs voters of the pertinent existing legal obligations affecting the utilities at issue—it informs voters that those utilities are generally required to sell a certain percentage of "qualifying electricity," which includes electricity from renewable energy sources. And by informing voters that the proposed measure would not permit electric companies to sell coal-generated electricity after 2029, the summary implicitly informs voters that no similar prohibition or limitation currently exists.

Mr. Blosser criticizes the summary for devoting more words to REC-related explanations than to the proposed measure's effect on sales of coal-generated electricity. But how current law defines RECs—and, accordingly, how the proposed measure affects REC use—is somewhat complicated. The measure's impact on sales of coal-generated electricity is easier to explain, and that explains the difference in the number of words used to describe the measure's various aspects.

In addition to criticizing the summary for the same reasons that they criticize other portions of the draft ballot title, Mr. Bolton and Mr. Robertson assert that the summary misleads voters by stating that "'qualifying electricity' * * * includes electricity from 'renewable energy sources' (defined by current law)." They assert that the summary suggests that "qualifying electricity" encompasses renewable energy sources and other sources when, in fact (according to them) the phrase "renewable energy sources" is broader than the phrase "qualifying electricity." They are mistaken. ORS 469A.005(9) defines "qualifying electricity" as "electricity described in ORS 469A.010." ORS 469A.010 describes three categories of electricity, most of which come from a "renewable energy source," but it appears that one of those categories—"electricity that the Bonneville Power Administration has designated as environmentally preferred power" (ORS 469A.010(3))—can constitute qualifying electricity without necessarily coming from a "renewable energy source." As a result, "qualifying electricity" *is* a broader term than "renewable energy source," even if "qualifying electricity" does connote, for the most part, electricity from "renewable energy sources."

Finally, petitioners Bolton and Robertson make three criticisms that the Attorney General agrees with. First, they observe that the summary, by stating that "RECs are issued to utilities that produce more qualifying electricity than required," may mislead voters. As they observe, OAR 330-160-0015(15) provides that one REC "is created in association with the generation of one MegaWatt-hour (MWh) of Qualifying Electricity"; in other words, a utility—in order to have RECs issued to it— need not produce *more* qualifying electricity than it is required to. It instead will receive an REC any time that it generates a single MWh of qualifying electricity. As a result, we have modified the summary so that it more accurately describes how RECs are issued.

We also have modified the summary to clarify that the proposed measure would not render *all* RECs unusable after three years; the summary, as modified, reflects that the three-year limit will apply only to RECs issued after the measure's effective date, and will apply only if an entity wishes to use an REC to satisfy ORS 469A.052's qualifying-electricity requirements.

To make room for the clarifications described above, we have eliminated the words "a" and "utility's" from the summary's first sentence.

Second, Mr. Bolton and Mr. Robertson criticize the summary for using the phrase "phases out" when it states that the measure "phases out coal-generated electricity sales," instead of simply stating that the measure requires coal-generated-electricity sales to be eliminated no later than 2030. We agree that, in the summary, use of the word "eliminates" would be more accurate, particularly given that the summary explains that companies may have until 2030 to stop making coal-generated-electricity sales (we note that use of "eliminates" by itself, without

the additional explanation that companies may have until 2030 to comply with the requirement, might give the mis-impression that the measure would require companies to *immediately* stop selling coal-generated electricity).

Third, Mr. Bolton and Mr. Robertson accurately note that the summary, instead of stating that the measure will make the required minimum sales of qualifying electricity 30-45% for "2035-2039," should identify "2025-2039" as the correct span of years.

The certified summary reads:

> **Summary:** If utility sells at least 3% of all electricity sold to consumers, current law generally requires—for 2020-2024—at least 20% of electricity sales to be "qualifying electricity," which includes electricity from "renewable energy sources" (defined by current law); subsequently, required minimum is 25%; to meet minimums, may use RECs (issued for each MegaWatt hour of renewable electricity produced; may be sold/transferred, used for future years). Proposed measure increases required minimum: 22% for 2020-2024, 30-45% for 2025-2039, 50% subsequently; new RECs usable for three years to meet minimums; electric companies must eliminate coal-generated electricity sales by 2030; would reduce, by 2032, new buildings' permissible "net energy consumption" (undefined) by 65%. Other provisions.

E. Conclusion

Upon further review of the proposed measure, and in response to the comments we received, we have modified the draft ballot title's caption, "yes" result statement, and summary. We certify the attached ballot title under ORS 250.067(2).

Sincerely,

/s/ Rolf C. Moan

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Enclosure

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Certified by Attorney General on January 26, 2015.
/s/ Rolf Moan
Assistant Attorney General

BALLOT TITLE

Increases electricity percentages required from renewable sources; reduces new buildings' permissible "net energy consumption" (undefined)

Result of "Yes" Vote: "Yes" vote increases percentage of electricity sales required from renewable sources; renewable energy certificates (RECs) expire; reduces permissible "net energy consumption" (undefined) for new buildings.

Result of "No" Vote: "No" vote retains current minimum percentages for electricity sales from renewable sources; RECs do not expire; retains current net energy consumption standard for new buildings.

Summary: If utility sells at least 3% of all electricity sold to consumers, current law generally requires—for 2020-2024—at least 20% of electricity sales to be "qualifying electricity," which includes electricity from "renewable energy sources" (defined by current law); subsequently, required minimum is 25%; to meet minimums, may use RECs (issued for each MegaWatt hour of renewable electricity produced; may be sold/transferred, used for future years). Proposed measure increases required minimum: 22% for 2020-2024, 30-45% for 2025-2039, 50% subsequently; new RECs usable for three years to meet minimums; electric companies must eliminate coal-generated electricity sales by 2030; would reduce, by 2032, new buildings' permissible "net energy consumption" (undefined) by 65%. Other provisions.

OREGON DEPARTMENT OF ENERGY

Oregon Renewable Portfolio Standard Eligible Resources

To be eligible, all electric generation facilities must at minimum be located within the Western Electricity Coordinating Council's territory

Unless otherwise stated Renewable Energy Certificates (RECs) must have been generated after January 1, 2007 from a facility that became operational after January 1, 1995 to be eligible for the Oregon Renewable Portfolio Standard

	Eligible?	Conditions of Eligibility	Conditions of Ineligibility	Section of Oregon Revised Statutes
Wind	**Yes**			ORS 469A 025 (1)(a)
Solar photovoltaic and solar thermal	**Yes**			ORS 469A 025 (1)(b)
Wave, tidal and ocean thermal	**Yes**			ORS 469A 025 (1)(c)
Geothermal	**Yes**			ORS 469A 025 (1)(d)
Biomass	Organic human or animal waste	Facilities that became operational *before* January 1, 1995 may be used to comply with the standard if they met PURPA requirements on March 4, 2010 RECs can be banked and used for compliance beginning January 1, 2026 with generation that occurs on or after January 1, 2011	Pre-1995 facilities must have been registered in the Western Renewable Energy Generation Information System (WREGIS) before January 1, 2011 (HB 3674 Sect 5)	ORS 469A 025 (2)(a)
	Spent pulping liquor			ORS 469A 025 (2)(b)
	Forest or rangeland woody debris from harvesting or thinning conducted to improve forest or rangeland ecological health and to reduce uncharacteristic stand replacing wildfire risk			ORS 469A 025 (2)(c)
	Wood material from hardwood timber grown on land described in ORS 321 267 (3)			ORS 469A 025 (2)(d)
	Agricultural residues			ORS 469A 025 (2)(e)
	Dedicated energy crops			ORS 469A 025 (2)(f)
	Landfill gas or biogas produced from organic matter, waste water, anaerobic digesters or municipal solid waste			ORS 469A 025 (2)(g)
	*To qualify biomass cannot have been treated with chemical preservatives		Direct combustion of biomass may not be used to comply with a renewable portfolio standard if *any* of the biomass combusted to generate the electricity includes wood that has been treated with ***chemical preservatives*** such as creosote pentachlorophenol or chromated copper arsenate	ORS 469A 025 (3)
Hydroelectric	Facilities constructed after January 1, 1995 must be located outside of protected areas	The facility was built after January 1, 1995 and is located outside any protected area designated by the Pacific Northwest Electric Power and Conservation Planning Council as of July 23, 1999, or any area protected under the federal Wild and Scenic Rivers Act or the Oregon Scenic Waterways Act		ORS 469A 025 (4)(a)
	Electricity is attributable to an efficiency upgrade	The electricity is attributable to efficiency upgrades made to the facility on or after January 1, 1995	If efficiency upgrade is made to a Bonneville Power Administration facility, only that portion of the electricity generation attributable to Oregon's share of the electricity may be used	ORS 469A 025 (4)(b) ORS 469A 020 (3)
	Low Impact Hydropower Institute (LIHI) certified and utility owned	Up to 50 average megawatts of generation per year from certified low-impact hydroelectric facilities that owned by Oregon utilities	All LIHI certified hydropower facilities are eligible, regardless of when the facilities became operational	ORS 469A 025 (5)(a) ORS 469A 020 (4) (a)
	Low Impact Hydropower Institute certified, not owned by a utility, and located in Oregon	Up to 40 average megawatts of generation from certified low-impact hydroelectric facilities that are not owned by a utility and located in Oregon	Only RECs generated after January 1, 2011 are eligible for compliance (HB 3649 Sect 3) Pre-1995 facilities are eligible with no restriction on operational date	ORS 469A 025 (5)(b) ORS 469A 020 (4) (b)
	Generation attributable to a capacity upgrade is not eligible		Capacity upgrades to a hydroelectric project include any increase in generating capacity other than an increase from an efficiency upgrade	ORS 469A 020 (2) and (3); OAR 330-160-050 (3)
Municipal Solid Waste	The facility was built *before* January 1, 1995	Only up to 11 average megawatts per year only if the facility is located within Oregon These facilities may not be used for compliance until January 1, 2026	The facility must have been registered in WREGIS before January 1, 2011 to be eligible	ORS 469A 025 (6)(a) ORS 469A 020 (6) HB 3674 Sect 5
	The facility was built *after* January 1, 1995	The total amount of electricity generated in Oregon these facilities may not exceed nine average megawatts per year for the purpose of complying with a renewable portfolio standard		ORS 469A 025 (6)(b)
Hydrogen Gas	Anhydrous ammonia is used as a fuel source at the hydrogen power station		Generation from the original source of energy cannot also used for compliance The facility must have been registered in WREGIS before January 1, 2011 to be eligible	ORS 469A 025 (7); HB 3674 Sect 5
	The electricity is derived from wind, solar photovoltaic, solar thermal, wave, tidal, ocean thermal, geothermal, eligible biomass, or an eligible hydroelectric facility			
Coal	**Ineligible**		ODOE may not approve [2007 c 301 §4; 2010 c 17 §3; 2010 c 71 §2]	ORS 469A 025 (9)
Petroleum	**Ineligible**		ODOE may not approve [2007 c 301 §4; 2010 c 17 §3; 2010 c 71 §2]	ORS 469A 025 (9)
Natural Gas	**Ineligible**		ODOE may not approve [2007 c 301 §4; 2010 c 17 §3; 2010 c 71 §2]	ORS 469A 025 (9)
Nuclear Fission	**Ineligible**		ODOE may not approve [2007 c 301 §4; 2010 c 17 §3; 2010 c 71 §2]	ORS 469A 025 (9)

EXHIBIT 6

CERTIFICATE OF FILING

I hereby certify that I electronically filed the PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 73) with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on February 9, 2016.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 73) upon the following individuals on February 9, 2016, by delivering a true, full, and exact copy thereof via U.S. Mail to:

Attorney General
Office of the Solicitor General
400 Justice Building
1162 Court St., NE
Salem, OR 97301-4096

Nicholas Blosser
6330 SE 32nd Avenue
Portland, OR 97202

Margaret Ngai
5623 SE Insley St.
Portland, OR 97206

And upon the following individual via email (irrlistnotifier@sos.state.or.us):

Jeanne Atkins, Secretary of State
Elections Division
255 Capitol St. NE, Ste. 501
Salem, OR 97310-0722
Fax: (503) 373-7414

DATED this 9th day of February, 2016.

GIBSON LAW FIRM, LLC

/s/ Jill Gibson

Jill Gibson, OSB # 973581
Of Attorneys for Petitioner