IN THE SUPREME COURT OF THE STATE OF OREGON

SCOTT D. BOLTON and DAVE ROBERTSON, Petitioners, v. ELLEN F. ROSENBLUM, ATTORNEY GENERAL, STATE OF OREGON, Respondent.	Supreme Court Case No. S_____

PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL

Ballot Title: Elections Division No. 72
Certified on January 26, 2016

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Under ORS 250.085(2), Petitioners have standing to bring this proceeding as electors dissatisfied with the certified title for Elections Division 72 ("IP 72") who timely submitted written comments on the draft title. The text of IP 72 is attached as Ex. 1. A copy of the title as certified and explained by the Attorney General is attached to this Petition as Ex. 2.

Petitioners challenge the certified title based upon the Attorney General's failure to incorporate comments made by the Petitioners and revisions made to the title by the Attorney General after expiration of the comment period. This Court should refer the ballot title to the Attorney General for modification to address the deficiencies specified below.

1. The Caption.

The caption does not reasonably identify the subject matter of the measure as required by ORS 250.030(2)(a) because the caption (1) uses the undefined term "renewable sources" when IP 72 applies to the much more limited and defined concept of "qualifying electricity"; (2) fails to inform voters that increasing the percentage sales of "qualifying electricity" is only a potential effect of IP 72; (3) describes coal-generated electricity as being "phase[d] out" when IP 72 requires a hard stop; (4) fails to inform voters to which electricity providers the increased percentage IP 72 imposes may apply; and (5) fails to identify to what entities the ban on charging for coal-generated electricity applies.

This Court has insisted that a caption describe a proposed measure's subject matter accurately because of the central importance of the caption to the decision-making process of petition signers and voters:

> "The caption, which is the first information that most potential petition signers and voters will see, is pivotal. It must 'inform potential petition signers and voters of the sweep of the measure.' *Terhune v. Myers*, 342 Or 475, 479, 154 P3d 1284 (2007). A caption should not 'understate or overstate the scope of the legal changes that the proposed measure would enact.' *Kain/Waller v. Myers*, 337 Or 36, 40, 93 P3d 62 (2004)."

Frazzini v. Myers, 344 Or 648, 654, 189 P3d 1227 (2008). The caption does not meet this standard.

Defect No. 1. Under current law, an "electric utility" that provides at least three percent of the state's electricity supply may be required to provide certain percentages of the utility's electricity from certain sources called "qualifying electricity" by certain years in the future. ORS 469A.052(1). The term "electric utility" covers all of the entities that provide power to Oregonians: "a municipal electric utility, a people's utility district[,] an electric cooperative," and a privately owned utility, called in utility vernacular an "electric company." ORS 757.600 (4), (11), (13).

Section 4 of IP 72 amends ORS 469A.052 to increase the percentage of "qualifying electricity" a covered utility may have to provide beginning in the next decade. For example, under ORS 469A.052(1)(d) and ORS 469A.100(1), if the cost of obtaining "qualifying electricity" does not exceed four percent of a covered utility's revenue requirements, beginning in 2025, a covered utility will

have to provide 25 percent of its electricity from "qualifying electricity"; under IP 72, if the cost of obtaining "qualifying electricity" does not exceed four percent of a covered utility's revenue requirements, the covered utility will have to increase the percentage to 30 percent.

The "qualifying electricity" the percentage of which a covered utility may have to increase is a specially defined term that does not have meaning outside the potential requirement to provide "qualifying electricity." As a concept, "qualifying electricity" is a subset of and produced from another defined term, "renewable energy source." ORS 469A.010, ORS 460A.020, ORS 469A.025. For purposes of the title for IP 72, the key point is that "qualifying electricity" does not include hydropower produced by the Bonneville Power Administration ("BPA") because the BPA's facilities predate 1995. ORS 469A.020(1), (2); http://1.usa.gov/1YRCLsZ.

The caption, however, unlike the summary, substitutes for "qualifying electricity" the colloquial term "renewable sources" that neither IP 72 nor current law uses and that is materially broader than the term "qualifying electricity." In common parlance, the concept of renewable sources includes hydropower. Every source, from school books[1] to leading environmental organizations,[2] to the United States agencies in charge of energy[3] considers

[1] http://www.kidport.com/reflib/science/energy/EnergySources.htm#Title.
[2] "Hydropower—energy produced by moving water—is the largest source of renewable electricity in the United States," http://www.nrdc.org/energy/renewables/hydropower.asp.

hydropower to be a renewable source.

Hydropower—in this case, hydropower existing as of 1995, which provides most of the state's electricity[4]—is not included among the renewable sources in the statutory scheme that IP 72 amends. This exclusion is the reason the term "renewable sources" will mislead voters. What is said about Washington's renewable portfolio law applies to IP 72 as well:

> "Because the region has so much renewable hydroelectric energy, the State had to step in and declare hydro to be *not a renewable* in order to use renewable mandates and credits to force more wind development. This was rather bizarre since all discussion of renewables—you know, those great pie-charts illustrating how large the renewable share of the mix has become—always includes hydro as a renewable. 'Wind Energy of No Use in the Pacific Northwest,' Forbes (Jan 18, 2014), http://www.forbes.com/sites/jamesconca/2014/01/18/wind-energy-of-no-use-in-the-pacific-northwest/#766eb5101a4b (emphasis in original; internal citation omitted)."

The "bizarre" definition of renewable sources is likely to mislead voters into thinking that to whomever this part of IP 72 applies (more on that below) can easily obtain electricity from renewable sources because BPA's hydropower is readily available as a "renewable source." Instead, a major effect of IP 72 is that covered electric providers will have to double electricity from other renewable sources.[5]

Defect No. 2. A covered utility's requirement to provide a certain

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[3] http://energy.gov/eere/renewables/water; http://www.eia.gov/Energyexplained/?page=hydropower_home.
[4] http://instituteforenergyresearch.org/media/state-regs/pdf/Oregon.pdf.
[5] In addition to being over-inclusive, "renewable sources" also has an unfair positive connotation as demonstrated by the incorporation of a portion of the

percentage of "qualifying electricity" is contingent on the cost of the "qualifying electricity" not exceeding four percent of the covered utility's annual revenue requirement. ORS 469A.100(1). The caption misleads voters by failing to inform them that the percentage increase in "qualifying electricity" is only a *potential* outcome. The title cannot say "increases" because an increase may or may not occur depending on the cost of "qualifying electricity" years in the future. Thus, whether IP 72 will cause an increase in the use of "qualifying electricity" will depend on a future state of affairs. Predicting the actions of individuals and markets in the future is speculation this Court prohibits. *Ascher v. Kulongoski*, 322 Or 516, 523, 909 P2d 1216 (1996).

Defect No. 3. IP 72 does not "phase[] out" charging for coal-generated electricity. To "phase out" means to "stop production or operation by phases[.]" Webster's Third New International Dictionary, p. 1695. In common understanding, therefore, phasing suggests a smooth transition. IP 72 does not stop "by phases" or provide any transition. Instead, IP 72 prescribes firm dates in the future by which "electric companies" must stop charging customers for electricity generated from coal: December 31, 2030, or the date on which a coal-generating facility is fully depreciated, whichever is sooner.

"Phases out" is also inconsistent with the use of the term in previous ballot titles where measures actually proposed to start or stop activities "by

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term into the name of the campaign supporting IP 72: "Renew Oregon." http://www.reneworegon.org/campaign.

phases." *E.g.*, *Rasmussen v. Kroger*, 351 Or 195, 198 (2011) ("Phases out estate and inheritance taxes"); *Sizemore v. Myers*, 332 Or 417, 421 (2001) ("Establishes phase-in for new deductions"). The Attorney General chose "phases out" to express that IP 72 would end coal generation in the future. Ex. 2, p. 2. Expressing a future end may be permissible, but expressing the future end as the result of phasing is not.

Defects Nos. 4 and 5. Currently, there are 39 providers of electricity in Oregon. http://1.usa.gov/1P0zywE. Only three provide at least three percent of the electricity supply, PacifiCorp, Portland General Electric, and Eugene Water and Electric Board, http://1.usa.gov/1JJZ1bQ, but, as a matter of mathematics, 33 of the 39 providers could become subject to the requirement to provide "qualifying electricity." On the other hand, only three electricity providers appear to be covered by the requirement to stop charging for coal-generated electricity.[6] The caption thus violates the teaching of *Rasmussen v. Rosenblum*, 354 Or 344, 345-48 (2013), by not informing voters, by statutory term or general description, to which electricity providers the different parts of IP 72 apply. In *Rasmussen*, this Court required modification of a caption that implied a measure applied to all estates, when the measure applied only to estates that passed to family members or trusts. The caption here suffers from the same

[6] One of the three "electric companies" as defined in ORS 757.600 is not an "electric utility" subject to the "qualifying electricity" requirement of ORS 469A.052. One of the three "electric utilities" currently required to provide "qualifying electricity" under ORS 469A.052 is not an "electric company." http://www.oregon.gov/energy/pages/power.aspx.

kind of problem. There is no statement of which electricity producers IP 72 requires to do what. The missing information belongs in the caption because the information is fundamental to a voter's understanding of the measure. Voters will be left without the answer to the question: "Does this measure apply to the electricity I use in my home or business?"

2. Result of "Yes" Vote Statement

The yes result statement does not reasonably identify the result of the measure if approved, as required by ORS 250.035(2)(b) and (3), because the result of yes statement carries forward the defects of the caption except for noting which entities must stop charging for electricity generated from coal. In addition, the yes result statement is (1) inaccurate when stating that IP 72 causes renewable energy certificates ("RECs") to "expire," and (2) is incomplete because the statement does not alert voters that "electric companies," the term IP 72 uses to identify the electricity providers that may not charge for coal-generated electricity, is not defined for purposes of IP 72.

A REC represents one megawatt-hour of electricity. RECs are the compliance instruments used to show that any required amount of "qualifying electricity" was procured. OAR 330-160-0015(9). RECs accrue to any generator producing qualifying electricity. Energy Trust of Oregon REC Report, p. 5 (March 23, 2015) (home solar panels), http://bit.ly/1JM1a6X.

According to the Oregon Department of Energy, a "REC can be used to

comply with [a requirement to obtain a percentage of electricity from 'qualifying electricity'], a voluntary utility customer program, or by anyone who makes environmental or renewable claims associated with renewable energy facilities." http://1.usa.gov/1P0zUDf. Large quantities of RECs are used by Oregon businesses, such as Intel Corporation, and governments, such as the Port of Portland. Energy Trust of Oregon REC Report, p. 10. Under current law, there is no limit on the duration of use of a REC for any purpose.

Section 7 of IP 72 limits only the number of years a covered utility may carry a REC forward to meet a requirement to obtain a percentage of electricity from "qualifying electricity." IP 72 does not limit the duration of use of a REC in any other circumstance, such as when used by businesses other than covered utilities or by covered utilities for a voluntary customer program.[7]

Section 3 of IP 72 prohibits "electric companies" from including coal-fired electricity in rates. In current utility law, "electric company" is a specially defined term, meaning a privately owned company—of which only three serve Oregon. IP 72, however, does not define "electric company" for purposes of section 3. Section 2 defines "electric company" only for purposes of section 2. The caption thus uses a term specially defined in current law without alerting voters that the term in IP 72 may or may not carry the same meaning.

[7] An example of a voluntary program that IP 72 does not affect is PacifiCorp's Blue Sky program through which, at customers' requests, the company "purchases renewable energy certificates from newly developed renewable energy facilities." https://www.pacificpower.net/bluesky.

3. Result of "No" Vote Statement

The no result statement does not reasonably identify the result of the rejection of the measure, as required by ORS 250.035(2)(c), because the no result statement carries forward the problems with the caption and, like the yes result statement, refers to RECs as expiring. It is true that, under current law, RECs do not expire, but the result of a no vote will not be a lack of expiration, because IP 72 does not cause RECs to expire.

4. Summary

The summary does not accurately or adequately summarize the measure and its major effects, as required by ORS 250.035(2)(d), because the summary carries forward the problems with the caption, yes result statement, and no result statement—except the summary correctly notes that IP 72 addresses "qualifying electricity," not renewable sources. However, the summary is inaccurate and, therefore, misleading, when referring to "qualifying electricity" as "include[ing] electricity from 'renewable energy sources[.]'" By using the term "includes," the summary gives the misimpression that "qualifying electricity" comes from "renewable energy sources" *and* from some other source or sources. Webster's Third New International Dictionary, p. 1143 ("include" means to "comprise as a discrete or subordinate part or item of a larger aggregate, group, or principle"). The relationship is the other way around. "Renewable energy sources" is a term that is broader than "qualifying

electricity."

The summary is also misleading and incomplete because, as explained above at pages 3 and 4, the exception to providing any "qualifying electricity"—the four-percent cost cap—makes any so-called "requirement" entirely contingent on events years in the future. Thus, there is no "requirement," general or otherwise, but only the potential for a requirement.

Finally, the summary errs, and, therefore, misleads voters, when stating that "RECs are issued to utilities that produce more qualifying electricity than required[.]" For other measures with the same text and summary, the Attorney General has conceded this error: Answering Memo, p. 18, *Bolton v. Rosenblum*, Supreme Court Case No. S063795.

Respectfully submitted this 9th day of February, 2016.

DAVIS WRIGHT TREMAINE LLP

By /s/ Gregory A. Chaimov

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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 ~~2022~~ 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.

SOLAR CHOICE

Section 8. Oregon Laws 2015, Chapter 556, section 3 is amended to read:

SECTION 3. (1) The Public Utility Commission shall hold a proceeding that includes opportunity for public comment, in a manner determined by the commission, for the purpose of examining a range of community solar programs and the attributes of different community solar program designs that allow individual customers to share in the costs and benefits of solar facilities. For purposes of this subsection, attributes of different community solar program designs include ownership structure, eligibility criteria, length and terms of contracts, subscription pricing and how bill credits are calculated.

(2) As part of the proceeding held under subsection (1) of this section, the commission shall consider:

(a) Individual ratepayer access to a specific solar resource;

(b) Costs to community solar program subscribers and non-subscribers;

(c) The role of utilities; and

(d) Any other reasonable consideration related to community solar program designs.

(3) The commission shall recommend a community solar program design, or a set of preferred attributes of different community solar program designs, that best balances the resource value benefits, costs and impacts to ratepayers to the interim committees of the Legislative Assembly related to energy and business on or before November 1, 2015.

(4) Not later than January 1, 2018, and pursuant to applicable rulemaking procedures, the commission shall adopt permanent rules mandating community solar programs. Those rules shall establish a target capacity and ensure that at least 15 percent of the capacity from each community solar project is provided to and used by residential low-income customers of each community solar project. For the purposes of this section, "low income" means income at or below 60 percent of the area median income, adjusted for family size, as determined by the State Housing Council based on information from the United States Department of Housing and Urban Development. All renewable energy certificates generated by the community solar project(s) shall be apportioned only to participating customers.

Section 9. 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.

ELLEN F. ROSENBLUM
Attorney General

FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

January 26, 2015

Jim Williams
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Re: Proposed Initiative Petition — Increases Percentage of Electricity Required from Renewable Sources; Phases Out Coal-Generated Electricity Sales
DOJ File #BT-72-15; Elections Division #2016-072

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 draft ballot title's 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; phases out coal-generated electricity sales

Commenter Nicholas Blosser asserts that the caption also should refer to section 8 of the proposed measure, which would require the Public Utilities Commission, by January 1, 2018, to "adopt permanent rules mandating community solar programs." Although our summary describes that portion of the measure, we have chosen not to include it elsewhere. Because nothing in the proposed measure or in current law seems to define "community solar programs," section 8's requirement appears somewhat ambiguous. As a result, it is not self evident that section 8 requires PUC to create rules with any particular substantive content; in other words, it is not clear that section 8 reflects a major effect of the proposed measure, such that it warrants being mentioned in the caption.

In addition, Mr. Blosser asserts that the word "sales"—in the phrase "phases out coal-generated electricity sales"—is "inaccurate and underinclusive"; 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.)

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.

Mr. Bolton and Mr. Robertson suggest that we substitute the word "charges" for sales," in the phrase "phases out coal-generated electricity sales." We do not believe, however, that such a substitution would enhance voters' understanding of the measure or provide a more accurate description of the proposed measure.

Mr. Bolton and Mr. 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. It does not state 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."

Mr. Bolton and Mr. Robertson suggest that the caption should clarify that the measure, in requiring coal-generated electricity sales to be eliminated, is directed only at "electric companies." But the caption, in stating that the measure "phases out coal-generated electricity sales," is accurate, even though it does not clarify that that portion of the measure is directed at "electric companies," as defined by ORS 757.600. IP 72, §§ 3(1) and 2(d). Again, this results from the pertinent word limit. The summary, however, informs voters that "electric companies" are the entities that will be affected.

Finally, Mr. Bolton and Mr. Robertson criticize the caption for using the phrase "phases out" when it states that the measure "phases out coal-generated electricity sales." They criticize the caption for thereby suggesting that the measure requires a "smooth transition," instead of simply stating that the measure requires coal-generated-electricity sales to be eliminated no later than 2030. Yet use of the word "eliminates" could create the misimpression that the measure would require electric companies to *immediately* stop charging for coal-generated electricity, when in fact some companies will have up until 2030 to do so. Because the strict word limitation for the caption makes it impractical to identify the 2030 deadline, and because the phrase "phases out" is less likely– compared to the word "eliminates"—to mislead voters, we have continued to use the phrase "phases out."

The certified caption reads:

Increases percentage of electricity required from renewable sources; phases out coal-generated electricity sales

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; phases out electric companies' sales of coal-generated electricity.

Each commenter criticizes the "yes" result statement for the same reasons that he criticizes 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 statement 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 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; phases out electric companies' sales of coal-generated electricity.

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; phase-out of coal-generated electricity sales not required.

Each commenter criticized the "no" result statement for essentially the same reasons that he criticized the "yes" result statement. We thus respond to those criticisms 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; phase-out of coal-generated electricity sales not required.

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 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. Requires electric companies to phase out coal-generated electricity sales by 2030. State must adopt rules mandating "community solar programs" (not defined). Other provisions.

Mr. Blosser criticizes the summary for using the word "sales" when referring to "coal-generated electricity sales." For the same reasons recounted already, we have continued to use the word.

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.

Mr. Blosser also criticizes the summary for stating that the "State must adopt rules mandating 'community solar programs' (not defined)." He argues that the phrase is "uninformative" and that it "does not explain to voters * * * what [s]ection 8 does." Mr. Cosgrove similarly criticizes that phrase for "inappropriately * * * [emphasizing] the state being required to adopt rules," instead of emphasizing "the new mandate." The phrase that appears in the summary, however, mirrors section 8's text, which provides, in part, that the state Public Utilities Commission "shall adopt permanent rules mandating community solar programs." Given that neither the proposed measure nor current law appears to define "community solar program," we believe that the summary sufficiently informs voters of section 8's contents.

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."

Petitioners Bolton and Robertson make two 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.

Second, Mr. Bolton and Mr. Robertson accurately note that the summary's reference to "2035-2039" should read "2024-2039." We have modified the summary accordingly.

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.

Finally, to make room for the clarifications described above, we have eliminated the word "utility's" from the summary's first sentence, and we have substituted the word "eliminate" for the word "phase out" (in the sentence that begins "Requires electric companies to phase out").

The certified summary reads:

> **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 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 (issued for each MegaWatt hour of renewable electricity produced; may be sold/transferred, used for future years). Proposed measure increases required minimum to: 22% for 2020-2024, 30-45% for 2025-2039, 50% subsequently. New RECs usable for three years to meet minimums. Requires electric companies to eliminate coal-generated electricity sales by 2030. State must adopt rules mandating "community solar programs" (not defined). 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 summary. We certify the attached ballot title under ORS 250.067(2).

Sincerely,

/s/ Rolf C. Moan

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

BALLOT TITLE

Increases percentage of electricity required from renewable sources; phases out coal-generated electricity sales

Result of "Yes" Vote: "Yes" vote increases percentage of electricity sales required from renewable sources; renewable energy certificates (RECs) expire; phases out electric companies' sales of coal-generated electricity.

Result of "No" Vote: "No" vote retains current minimum percentages for electricity sales from renewable sources; RECs do not expire; phase-out of coal-generated electricity sales not required.

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 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 (issued for each MegaWatt hour of renewable electricity produced; may be sold/transferred, used for future years). Proposed measure increases required minimum to: 22% for 2020-2024, 30-45% for 2025-2039, 50% subsequently. New RECs usable for three years to meet minimums. Requires electric companies to eliminate coal-generated electricity sales by 2030. State must adopt rules mandating "community solar programs" (not defined). Other provisions.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on February 9, 2016, I directed the **PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL** to be electronically filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, OR 97301-2563, by using the Court's electronic filing system.

I further certify that on February 9, 2016, I directed the **PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL** to be served upon the Respondent, Respondent's attorney, and the parties, as indicated and listed below:

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I further certify that, on February 9, 2016, I directed a PDF of the completed **Notice of Ballot Title Challenge (SEL 324)** to be served upon the Secretary of State via email to irrlistnotifier.sos@state.or.us.

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