

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. 73
Certified on January 26, 2016

Chief Petitioners Nicholas Blosser and Margaret Ngai

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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 73 (“IP 73”) who timely submitted written comments on the draft title. The text of IP 73 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 73 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 73; (3) describes coal-generated electricity as being “phase[d] out” when IP 73 requires a hard stop; (4) fails to inform voters to which electricity providers the increased percentage IP 73 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 73 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 73, 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 73, 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 73 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 books¹ to leading environmental organizations,² to the United States agencies in charge of energy³ 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 electricity⁴—is not included among the renewable sources in the statutory scheme that IP 73 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 73 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 73 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 73 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

³ <http://energy.gov/eere/renewables/water>;

<http://www.eia.gov/Energyexplained/?page=hydropower> home.

⁴ <http://instituteenergyresearch.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 73 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 73 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 73 does not stop “by phases” or provide any transition. Instead, IP 73 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

term into the name of the campaign supporting IP 73: “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 73 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 73 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 73 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 73 causes renewable energy certificates ("RECs") to "expire," and (2) is incomplete because the statement does not alert voters that "electric companies," the term IP 73 uses to identify the electricity providers that may not charge for coal-generated electricity, is not defined for purposes of IP 73.

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 73 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 73 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 73 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 73, 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 73 may or may not carry the same meaning.

⁷ An example of a voluntary program that IP 73 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 73 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 73 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.

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SECRETARY OF STATE

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.

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.

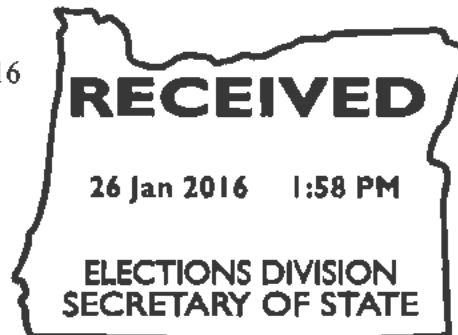
(4) The director shall require updates to the energy efficiency standards of the state building code to ensure a 65% reduction in the annual net energy consumption of newly constructed buildings by 2032, as compared to the requirements of the 2014 state building code. In establishing the code changes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



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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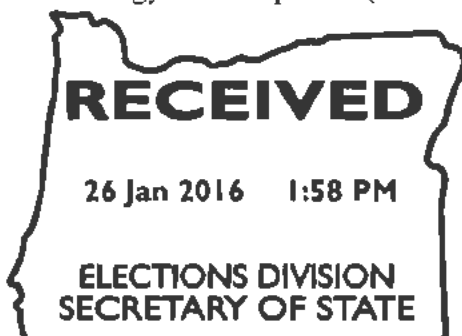
BALLOT TITLE

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.



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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