IN THE SUPREME COURT OF THE STATE OF OREGON

PAUL COSGROVE, Petitioner, v. ELLEN F. ROSENBLUM, Attorney General, State of Oregon, Respondent.	Case No. PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL Initiative Petition 63 (2016)

BALLOT TITLE CERTIFIED
December 21, 2015
Initiative Petition 63
Chief Petitioners: Nicholas Blosser and Margaret Ngai

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I. PETITION TO REVIEW BALLOT TITLE

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

II. ARGUMENTS AND AUTHORITIES

A. Introduction

IP 63 would amend Oregon's Renewable Portfolio Standard ("RPS"). The 2007 Legislature created the RPS, which requires utilities to provide a percentage their retail electricity sales from renewable energy sources. *See* ORS ch 469A. Specifically, utilities that deliver over 3% of Oregon's retail electricity sales must provide 25% of their sales from sources that qualify as "renewable" by 2025. ORS 469A.010; 469A.052. The RPS also requires interim performance obligations of 5% in 2011; 15% in 2015; and 20% in 2020.

The Legislative Assembly established strict requirements regarding what types of energy may be considered "renewable" under the RPS. *See* Exhibit 3 at 8.

[1] A copy of IP 63 is attached as Exhibit 1; the draft ballot title is attached as Exhibit 2; Petitioner's comments are attached as Exhibit 3; the Attorney General's explanatory letter is attached as Exhibit 4; and the certified ballot title is attached as Exhibit 5.

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

The RPS renewable mandates affect both large for-profit utility companies and small public or not-for-profit utility companies, although the differences between the two are significant. Oregon has 37 Consumer Owned Utilities (COUs), which are either operated by municipalities or public utility districts, or are not-for-profit rural electric cooperatives. These COUs collect rates sufficient to cover their costs of operations and are locally governed by elected

boards and governments. COUs mostly serve rural areas and generally are not large enough to invest in their own generation facilities; thus they must purchase their power from others. Currently, Oregon COUs purchase 85% of their power under Federal Hydro System (BPA) contracts. Importantly, COUs generate no energy from coal. Oregon's largest COU is Eugene Water & Electric, which provides approximately 4.97% of the state's retail electricity sales. Oregon PUC 2014 Utility Statistics (http://www.puc.state.or.us/docs/statbook2014WEB.pdf). The next largest, Umatilla Electric Cooperative, provides approximately 2.86% of the state's retail electricity sales, but is expected to cross the 3% threshold next year, thus requiring it to meet the same renewable requirements as a large for-profit utility. *See Id.*

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

B. <u>IP 63</u>

IP 63 would impact both large for-profit utilities and smaller public and not-

for-profit utilities that deliver over 3% of retail electricity sales. Specifically, Section 3 would prohibit all coal-fired electricity sales by 2030, or the year in which the resource was fully depreciated, whichever is earlier. Section 4 would increase the RPS requirement that 25% of electricity must come from "renewable sources" by 2025, to 50% by 2040 - essentially doubling the compliance standard. And the interim performance obligations are increased from 20% to 22% by 2020; from 25% to 30% by 2025; 40% by 2030, and 45% by 2035.

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

C. IP 63's Ballot Title

The ballot title contains one fundamental flaw: failure to put "renewable sources" in quotation marks to indicate that IP 63 adopts a special definition of this term. This insufficiency causes the caption and results statements to be overinclusive and misleading.

1. The Caption

ORS 250.035(2)(a) requires a ballot title to contain "[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure." As the "headline" for the ballot title, the caption "provides the context for the reader's consideration of the other information in the ballot title." *Mabon v. Myers*, 332 Or 633, 33 P3d 988, 990 (2001) (citing *Greene v. Kulongoski*, 322 Or 169, 175, 903 P2d 366 (1995)). A caption complies substantially with the requirements of ORS 250.035(2)(a) if it identifies the subject matter of the proposed measure in terms that will not confuse or mislead potential petition signers and voters. *Id.* Additionally, a caption that is overinclusive does not comply with statutory requirements. *See Brady v. Kroger*, 347 Or 518, 524, 225 P3d 36 (2009) (illustrating principle).

The caption for IP 63 does not substantially comply with statutory standards because the failure to put "renewable sources" in quotation marks will likely cause voters to mistakenly believe the term includes all types of natural energy sources.

"Renewable" is commonly used by the general public to refer to something that is from a natural source. "Renewable" is defined as "a natural resource or source of energy, not depleted when used." http://www.oxforddictionaries.com/us/definition/american_english/renewable. However, pursuant to IP 63, energy from natural sources must jump through two hoops to be considered "renewable:" (1) the energy must meet statutorily imposed requirements regarding the age of the generating facility and (2) the energy must meet statutorily imposed requirements regarding the type of energy. Section 6(11) (adopting definition of "renewable energy source" in ORS 469A.025); Section 6(9) (adopting definition of "qualifying electricity" in ORS 469A.010). An energy source that does not meet these requirements is not considered "renewable" pursuant to IP 63 even if it is otherwise a natural source of energy that is not depleted when used. Adding to the confusion, the types of energy included in IP 63's definition of "renewable energy source" differ from the types of "renewable energy" listed in ORS 469B.250(3), which includes biomass, biogas, and hydroelectric, without limitation.

Because the initiative's definition of "renewable" does not comport with the commonly understood and broader definition, or even with other statutory references to "renewable," the term should be placed in quotation marks and followed by the parenthetical "(defined)." *See Carley/Towers v. Myers*, 340 Or

222, 229, 132 P3d 651, 655-56 (2006) ("this court has approved the use of specially defined terms in quotation marks, followed by the word 'defined' in parentheses, to signal that the proposed measure specially defines the terms and uses it in that specially defined sense"); *Hunnicutt v. Myers*, 340 Or 83, 86, 127 P3d 1182 (2006) (illustrating principle). As acknowledged by Respondent, a subject matter of IP 63 is "renewable sources" of energy; thus voters must understand the definition of this critical term, and the use of quotation marks will alert voters that the term has a specific definition that may differ from their own definition.

Respondent declines to put "renewable" in quotation marks because "using such a parenthetical in this case might only mislead voters into thinking that the proposed measure – as opposed to existing law – defines "renewable [energy] sources." Exhibit 4 at 2-3. This argument should be rejected because the initiative *does* define "renewable energy source." Section 6 of IP 63 provides: "~~(10)~~ **(11)** 'Renewable energy source' means a source of electricity described in ORS 469A.025." Thus, "the measure itself defines the phrase at issue." Exhibit 4 at 2-3. To argue otherwise is simply unconvincing because clearly the critical term "renewable" is not *undefined* by IP 63. Rather, Section 6(11) of the initiative explicitly provides that "renewable energy source" means electricity described in ORS 469A.025, which strictly limits the types of energy that may be considered

"renewable."

The fact that the initiative adopts and uses a special definition that also exists in current law does not alleviate the need to alert voters to that special definition. The purpose of using quotation marks is to let voters know that a term has a special definition – one that might differ from their own definition – and that the initiative "uses it in that specially defined sense." *Carley/Towers v. Myers*, 340 Or at 229. Voters should not be left in the dark regarding IP 63's definition of "renewable" simply because that definition also exists in current law. Accordingly, this Court should reject Respondent's technical argument that would result in voter confusion regarding the meaning of "renewable" and the subject matter of IP 63. For these foregoing reasons, Petitioner respectfully requests the Court to require modification of the caption so that "renewable sources" is put in quotation marks.

2. <u>The Results Statements</u>

ORS 250.035(2) (b) requires a ballot title to contain "[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is approved." The statement must inform voters of the "outcome that is the most significant and immediate, or that carries the greatest consequence, for the general public." *Novick v. Myers*, 337 Or 568, 574 (2004). IP 63's "yes" statement is also noncompliant because voters are not notified that the initiative adopts a special definition for "renewable resources. " This will likely result in

voters mistakenly believing that all types of renewable energy, as commonly understood, may be used to comply with the initiative.

ORS 250.035(2)(c) requires that a ballot title contain a "simple and understandable statement," of not more than 25 words, explaining what will happen if voters reject the measure. For the reasons stated above, the "no" statement is noncompliant because "renewable sources" is not in quotation marks.

III. CONCLUSION

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

DATED this 6th day of January, 2016.

Respectfully submitted,

/s/ Jill Gibson
Jill Gibson, OSB #973581
GIBSON LAW FIRM, LLC

Of Attorneys for Petitioner

Be it enacted by the People of the State of Oregon:

ELIMINATING COAL BY 2030

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

Section 2. As used in this section:

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

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

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

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

Section 3.

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

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

INCREASING RENEWABLE ELECTRICITY REQUIREMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) The commission shall adopt rules:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 8. 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.

OFFICE OF THE SECRETARY OF STATE

JEANNE P. ATKINS
SECRETARY OF STATE

ROBERT TAYLOR
DEPUTY SECRETARY OF STATE

ELECTIONS DIVISION

JIM WILLIAMS
DIRECTOR

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(503) 986-1518

INITIATIVE PETITION

TO: All Interested Parties

FROM: Lydia Plukchi, Compliance Specialist

DATE: November 19, 2015

SUBJECT: Initiative Petitions **2016-063 and 2016-064** Draft Ballot Title

The Elections Division received draft ballot titles from Attorney General on November 19, 2015, for Initiative Petitions **2016-063 and 2016-064**, proposed for the November 8, 2016, General Election.

Caption

2016-063 Increases percentage of electricity that must come from renewable sources; requires eliminating coal-generated electricity

2016-064 Requires increased electricity from renewable sources, limits compensation if standards unmet; eliminates coal-generated electricity

Chief Petitioners

Nicholas Blosser	6330 SE 32nd Avenue Portland, OR 97202
Margaret Ngai	5623 SE Insley Street Portland, OR 97206

Comments

Written comments concerning the legal sufficiency of the draft ballot title may be submitted to the Elections Division. Comments will be delivered to the Attorney General for consideration when certifying the ballot title.

Additionally, the Secretary of State is seeking public input on whether the petition complies with the procedural constitutional requirements established in the Oregon Constitution for initiative petitions. The Secretary will review any procedural constitutional comments received by the deadline and make a determination whether the petition complies with constitutional requirements.

To be considered, draft ballot title comments and procedural constitutional requirement comments must be received in their entirety by the Elections Division no later than 5 pm:

Comments Due	How to Submit	Where to Submit
December 4, 2015	Scan and Email	irrlistnotifier.sos@state.or.us
	Fax	503.373.7414
	Mail	255 Capitol St NE Ste 501, Salem OR 97310

ELLEN F. ROSENBLUM
Attorney General

FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

November 19, 2015

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

Re: Proposed Initiative Petition — Increases Percentage of Electricity that Must come from Renewable Sources; Requires Eliminating Coal-Generated Electricity
DOJ File #BT-63-15; Elections Division #2016-063

Dear Mr. Williams:

We have prepared and hereby provide to you a draft ballot title for the above-referenced prospective initiative petition. The proposed measure relates to increasing the percentage of electricity that must come from a renewable source and eliminating coal-generated electricity.

Written comments from the public are due to you within ten business days after your receipt of this draft title. A copy of all written comments provided to you should be forwarded to this office immediately thereafter.

A copy of the draft ballot title is enclosed.

Alicia Thomas
Legal Secretary

AFT/6954658

Enclosure

Nicholas Blosser
6330 SE 32nd Ave
Portland, OR 97202

Margaret Ngai
5623 SE Insley Street
Portland, OR 97206

DRAFT BALLOT TITLE

Increases percentage of electricity that must come from renewable sources; requires eliminating coal-generated electricity

Result of "Yes" Vote: "Yes" vote increases minimum percentages of retail electricity sales that must come from renewable sources; requires electric companies to eliminate coal-generated electricity by 2030.

Result of "No" Vote: "No" vote retains current minimum percentages of retail electricity sales that must come from renewable energy; electric companies not required to eliminate coal-fired resources.

Summary: If a utility sells electricity to retail electricity consumers in an amount equaling at least 3% of all electricity sold to retail electricity consumers, current law requires that—for 2020-2024—at least 20% of the electricity that the utility sells to such consumers must constitute "qualifying electricity," defined as including electricity from renewable energy sources; for subsequent years, required minimum is 25%. Proposed measure would increase the required minimum to 22% for 2020-2024, 30% for 2025-2029, 40% for 2030-2034, 45% for 2035-2039, and 50% for subsequent years. Measure also would require electric companies to eliminate coal-generated electricity from their supplies by no later than January 1, 2030; some exceptions. Other provisions.

GIBSON
LAW FIRM

December 4, 2015

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

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

Re: Public Comment on Initiative Petition 63 (2016)

Dear Secretary Atkins,

I represent Paul Cosgrove, an elector in the State of Oregon who wishes to comment on the draft ballot title for IP 63 (2016). Thank you for the opportunity to provide comments.

I. INTRODUCTION

A. Current Law

The 2007 Legislature created a Renewable Portfolio Standard (RPS) that requires utilities to provide a percentage their retail electricity sales from "renewable" energy sources. *See* ORS ch 469A. Specifically, pursuant to the RPS, utilities that deliver over 3% of the retail electricity sales in Oregon must provide 25% of their sales from renewable sources by 2025. ORS 469A.052. The RPS also requires interim performance obligations of 5% in 2011; 15% in 2015; and 20% in 2020. ORS 469A.025 provides a list of energy sources that are considered "renewable" and may be used to comply with the RPS. Thus far, all effected utilities have met their RPS requirements.

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

expected to cross the 3% threshold next year, thus requiring it to meet the same renewable requirements as a large for-profit utility.

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

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

B. IP 63

IP 63 would impact both large for-profit utilities and smaller public and not-for-profit utilities that deliver over 3% of retail electricity sales. Specifically, Section 3 would prohibit all coal-fired resources by 2030, or the year in which the resource was fully depreciated, whichever is earlier. Section 4 would increase the RPS requirement that 25% of electricity must come from renewable sources by 2025, to 50% by 2040 - essentially doubling the compliance standard. And the interim performance obligations are increased from 20% to 22% by 2020; from 25% to 30% by 2025; 40% by 2030, and 45% by 2035.

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

II. DRAFT BALLOT TITLE

The Attorney General has proposed the following ballot title for IP 63:

Increases percentage of electricity that must come from renewable sources; requires eliminating coal-generated electricity

Result of "Yes" Vote: "Yes" vote increases minimum percentages of retail electricity sales that must come from renewable sources; requires electric companies to eliminate coal-generated electricity by 2030.

Result of "No" Vote: "No" vote retains current minimum percentages of retail electricity sales that must come from renewable energy; electric companies not required to eliminate coal-fired resources.

Summary: If a utility sells electricity to retail electricity consumers in an amount equaling at least 3% of all electricity sold to retail electricity consumers, current law requires that—for 2020-2024—at least 20% of the electricity that the utility sells to such consumers must constitute "qualifying electricity," defined as including electricity from renewable energy sources; for subsequent years, required minimum is 25%. Proposed measure would increase the required minimum to 22% for 2020-2024, 30% for 2025-2029, 40% for 2030-2034, 45% for 2035-2039, and 50% for subsequent years. Measure also would require electric companies to eliminate coal-generated electricity from their supplies by no later than January 1, 2030; some exceptions. Other provisions.

III. COMMENTS ON THE DRAFT BALLOT TITLE

A. The Caption

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

signers and voters of the sweep of the measure." *Terhune v. Myers*, 342 Or 475, 479, 154 P3d 1284 (2007); *see also Greene v. Kulongoski*, 322 Or 169, 174-75, 903 P2d 366 (1995) (explaining that caption may not obscure measure's effect or make it difficult for voters to understand measure's subject).

At the outset, we would like to recognize that describing a complex measure within the prescribed word limitations can be a difficult task. Overall, we believe the Attorney General has done a nice job in drafting IP 63's ballot title. Particularly, we agree with the decision to not insert a reference to "large utilities" because IP 63 would apply to COUs that are not what is commonly understood as "large." The Oxford English Dictionary (online ed.) defines "large" as "of considerable or relatively great size, extent, or capacity." http://www.oxforddictionaries.com/us/definition/american_english/large. The RPS increase proposed by IP 63 would apply to any utility that provides as little as 3% of the state's retail electricity sales, and this is not "of great size" or "large" as commonly understood by the general public. As such, we believe the ballot title should continue to describe the effected utilities as ones that "sell[] electricity to retail electricity consumers in an amount equaling at least 3% of all electricity sold to retail electricity consumers," as done in the draft summary. The caption does not allow enough words to accurately describe the utilities that will be impacted, so the summary is the appropriate place to do so.

However, we do believe that the failure to put "renewable sources" in quotation marks renders the caption misleading and overinclusive. "Renewable" is a trendy word often used by the general public to refer to something that is from a natural source. "Renewable" is defined as "a natural resource of source of energy, not depleted when used." http://www.oxforddictionaries.com/us/definition/american_english/renewable. However, as used in IP 63, "renewable" refers to the specifically defined sources of energy listed in ORS 469A.025. An energy source not listed in this statute is not considered "renewable" for purposes of complying with the RPS even if it is otherwise a natural source of energy that is not depleted when used. For example, certain hydroelectric and biomass energy is not from a "renewable source" under the RPS. *See* Exhibit 1.

Additionally, even the "renewable energy sources" listed in ORS 469A.025 may not be used to meet the RPS compliance standards unless it is "qualifying electricity" and generated by facilities that became operational on or after January 1, 1995. ORS 469A.010; ORS 469.020. Due to these statutory limitations on what qualifies as renewable energy, hydroelectric power is not "renewable" under Oregon law if it is generated by a dam that is 20 years old. ORS 469A.020(3).

Because the RPS's specific definition of "renewable" does not comport with the commonly understood and broader definition of "renewable," the term should be placed in quotation marks and followed by the parenthetical "(defined)". *See, e.g., Carley/Towers v. Myers*, 340 Or 222, 132 P3d 651, 655-56 (2006) ("this court has approved the use of specially defined terms in quotation marks, followed by the word 'defined' in parentheses, to signal that

the proposed measure specially defines the terms and uses it in that specially defined sense"); *Hunnicutt v. Myers*, 340 Or 83, 86, 127 P3d 1182 (2006) (illustrating principle). The word "renewable" is a critical word and voters must understand its meaning to understand the scope of IP 63. A reference to "'renewable resources' (defined)" will alert voters that the term has a specific definition that may differ from their own definition. For these reasons, we believe all references to "renewable" throughout the ballot title should be put in quotation marks.

To address this insufficiency, we propose the following caption:

Increases percentage of electricity required to come from "renewable sources" (defined); requires eliminating coal-generating electricity

B. The Result of "Yes" Vote Statement

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

For convenience, we will restate the "yes" vote result statement proposed by the Attorney General:

Result of "Yes" Vote: "Yes" vote increases minimum percentages of retail electricity sales that must come from renewable sources; requires electric companies to eliminate coal-generated electricity by 2030.

This "yes" vote result statement suffers from the same deficiency as the caption because it does not alert voters that "renewable sources" has a specific definition. This will likely result in voters mistakenly believing IP 63 allows all types of renewable energy to be used to comply with the RPS. To address this insufficiency, we propose:

Result of "Yes" Vote: "Yes" vote increases minimum percentages of retail electricity sales required from "renewable sources" (defined); requires electric companies to eliminate coal-generated electricity by 2030.

C. The Result of "No' Vote Statement

ORS 250.035(2)(c) requires a ballot title to contain a "simple and understandable statement," of not more than 25 words, explaining what will happen if voters reject the measure. This means that the statement must explain to voters "the state of affairs" that will exist if the initiative is rejected, i.e. the status quo. Also, a "no" vote result statement should "address[ ] the

substance of current law *on the subject matter of the proposed measure*" and "summarize [ ] the current law accurately." *Novick/Crew* at 577, 100 P.3d 1064 (emphasis in original).

The draft "no" vote statement is:

Result of "No" Vote: "No" vote retains current minimum percentages of retail electricity sales that must come from renewable energy; electric companies not required to eliminate coal-fired resources.

Because the result statements should be parallel, we suggest using the phrase "renewable sources" rather than "renewable energy." *See* ORS 250.035(2)(c) ("Any thing or action described both in the statement required by paragraph (b) of this subsection and in the statement required by this paragraph shall be described using the same terms in both statements, to the extent practical."). A change in terminology may be confusing to voters because the caption and "yes" vote result statement both refer to "renewable sources." And for the reasons stated above, we believe the phrase "renewable sources" should be placed in quotation marks followed by the word "defined." Please consider revising the "no" vote result statement as follows:

Result of "No" Vote: "No" vote retains current minimum percentages of retail electricity sales required from "renewable sources" (defined); electric companies not required to eliminate coal-fired resources.

D. The Summary

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

The summary adequately describes several elements of IP 63; however, it contains a few deficiencies that need to be corrected. For convenience, we restate the draft summary:

Summary: If a utility sells electricity to retail electricity consumers in an amount equaling at least 3% of all electricity sold to retail electricity consumers, current law requires that—for 2020-2024—at least 20% of the electricity that the utility sells to such consumers must constitute "qualifying electricity," defined as including electricity from renewable energy sources; for subsequent years, required minimum is 25%. Proposed measure would increase the required minimum to 22% for 2020-2024, 30% for 2025-2029, 40% for 2030-2034, 45% for 2035-2039, and 50% for subsequent years. Measure also would require electric companies to eliminate coal-generated electricity from their supplies by no later than January 1, 2030; some exceptions. Other provisions.

As an initial matter, the summary does not identify for voters the significant proposed change regarding RECs. As discussed above, the ability to use RECs is vital to COUs' ability to comply with their RPS. COUs are generally too small to invest in their own electricity generating facilitates, so, unlike large generating utilities, they must purchase RECs to comply with their RPS. Indeed, the legislature recently expanded the ability of COUs to comply with renewable mandates by purchasing RECs. Or Laws 2014, ch 100, § 2. IP 63 would limit the use of RECs by imposing an expiration date three compliance years after issuance. This limitation would have a major effect on both COUs' ability to use RECs and IOUs' ability to sell RECs; yet, the summary makes no mention of this significant change. The summary must give voters enough information to understand what will happen if the measure is adopted; however, the draft summary gives voters no information regarding what will happen to the REC system if IP 63 is adopted. As such, the summary must include information regarding the proposed expiration of RECs.

The summary also incorrectly states that "qualifying electricity" is "defined as including electricity from renewable energy sources." "Qualifying electricity" is actually defined as electricity that is generated by facilitates that became operational in 1995 or later. ORS 469A.020. Current law also contains other limitations and requirements for energy that may be considered "qualified energy." *See Id.*; ORS 469A.010. Stating that "qualifying electricity" is defined as "electricity from renewable energy sources" is an oversimplification to such an extent to render it inaccurate, especially since voters are not told that "renewable energy sources" is itself a specifically defined term. To remedy this inaccuracy, the summary should refer to "qualified electricity" as "defined as including electricity from 'renewable energy sources' (defined)." Otherwise, we believe the draft summary substantially complies with statutory standards.

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

Very truly yours,

Jill Gibson

OREGON DEPARTMENT OF ENERGY

Oregon Renewable Portfolio Standard Eligible Resources

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

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

	Eligible?	Conditions of Eligibility	Conditions of Ineligibility	Section of Oregon Revised Statutes
Wind	**Yes**			ORS 469A.025 (1)(a)
Solar photovoltaic and solar thermal	**Yes**			ORS 469A.025 (1)(b)
Wave, tidal and ocean thermal	**Yes**			ORS 469A.025 (1)(c)
Geothermal	**Yes**			ORS 469A.025 (1)(d)
Biomass	Organic human or animal waste	Facilities that became operational *before* January 1, 1995 may be used to comply with the standard if they met PURPA requirements on March 4, 2010. RECs can be banked and used for compliance beginning January 1, 2026 with generation that occurs on or after January 1, 2011.	Pre-1995 facilities must have been registered in the Western Renewable Energy Generation Information System (WREGIS) before January 1, 2011 (HB 3674 Sect. 5).	ORS 469A.025 (2)(a)
	Spent pulping liquor			ORS 469A.025 (2)(b)
	Forest or rangeland woody debris from harvesting or thinning conducted to improve forest or rangeland ecological health and to reduce uncharacteristic stand replacing wildfire risk			ORS 469A.025 (2)(c)
	Wood material from hardwood timber grown on land described in ORS 321.267 (3)			ORS 469A.025 (2)(d)
	Agricultural residues			ORS 469A.025 (2)(e)
	Dedicated energy crops			ORS 469A.025 (2)(f)
	Landfill gas or biogas produced from organic matter, waste water, anaerobic digesters or municipal solid waste			ORS 469A.025 (2)(g)
	*To qualify biomass cannot have been treated with chemical preservatives		Direct combustion of biomass may not be used to comply with a renewable portfolio standard if *any* of the biomass combusted to generate the electricity includes wood that has been treated with ***chemical preservatives*** such as creosote pentachlorophenol or chromated copper arsenate	ORS 469A.025 (3)
Hydroelectric	Facilities constructed after January 1, 1995 must be located outside of protected areas	The facility was built after January 1, 1995 and is located outside any protected area designated by the Pacific Northwest Electric Power and Conservation Planning Council as of July 23, 1999, or any area protected under the federal Wild and Scenic Rivers Act or the Oregon Scenic Waterways Act		ORS 469A.025 (4)(a)
	Electricity is attributable to an efficiency upgrade	The electricity is attributable to efficiency upgrades made to the facility on or after January 1, 1995.	If efficiency upgrade is made to a Bonneville Power Administration facility, only that portion of the electricity generation attributable to Oregon's share of the electricity may be used.	ORS 469A.025 (4)(b); ORS 469A.020 (3)
	Low Impact Hydropower Institute (LIHI) certified and utility owned	Up to 50 average megawatts of generation per year from certified low-impact hydroelectric facilities that owned by Oregon utilities	All LIHI certified hydropower facilities are eligible, regardless of when the facilities became operational.	ORS 469A.025 (5)(a); ORS 469A.020 (4) (a)
	Low Impact Hydropower Institute certified, not owned by a utility, and located in Oregon	Up to 40 average megawatts of generation from certified low-impact hydroelectric facilities that are not owned by a utility and located in Oregon	Only RECs generated after January 1, 2011 are eligible for compliance. (HB 3649 Sect. 3) Pre-1995 facilities are eligible with no restriction on operational date.	ORS 469A.025 (5)(b); ORS 469A.020 (4) (b).
	Generation attributable to a capacity upgrade is not eligible.		Capacity upgrades to a hydroelectric project include any increase in generating capacity other than an increase from an efficiency upgrade	ORS 469A.020 (2) and (3); OAR 330-160-050 (3)
Municipal Solid Waste	The facility was built *before* January 1, 1995	Only up to 11 average megawatts per year only if the facility is located within Oregon. These facilities may not be used for compliance until January 1, 2026	The facility must have been registered in WREGIS before January 1, 2011 to be eligible.	ORS 469A.025 (6)(a); ORS 469A.020 (6); , HB 3674 Sect. 5
	The facility was built *after* January 1, 1995	The total amount of electricity generated in Oregon these facilities may not exceed nine average megawatts per year for the purpose of complying with a renewable portfolio standard		ORS 469A.025 (6)(b)
Hydrogen Gas	Anhydrous ammonia is used as a fuel source at the hydrogen power station.		Generation from the original source of energy cannot also used for compliance. The facility must have been registered in WREGIS before January 1, 2011 to be eligible.	ORS 469A.025 (7); HB 3674 Sect. 5
	The electricity is derived from wind, solar photovoltaic, solar thermal, wave, tidal, ocean thermal, geothermal, eligible biomass, or an eligible hydroelectric facility.			
Coal	**Ineligible**		ODOE may not approve [2007 c.301 §4; 2010 c.17 §3; 2010 c.71 §2]	ORS 469A.025 (9)
Petroleum	**Ineligible**		ODOE may not approve [2007 c.301 §4; 2010 c.17 §3; 2010 c.71 §2]	ORS 469A.025 (9)
Natural Gas	**Ineligible**		ODOE may not approve [2007 c.301 §4; 2010 c.17 §3; 2010 c.71 §2]	ORS 469A.025 (9)
Nuclear Fission	**Ineligible**		ODOE may not approve [2007 c.301 §4; 2010 c.17 §3; 2010 c.71 §2]	ORS 469A.025 (9)

5/1/2012

EXHIBIT 1

ELLEN F. ROSENBLUM
Attorney General

FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

December 21, 2015

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 Percentage of Electricity Required from Renewable Sources; Phases Out Coal-Generated Electricity Sales
DOJ File #BT-63-15, Elections Division #2016-063

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 caption, result statements, 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 that must come from renewable sources; requires eliminating coal-generated electricity

Changes that we made to the draft ballot title caption:

Commenters Scott Bolton and Dave Robertson (represented by Greg Chaimov) stated that the caption would mislead voters by describing the proposed measure as "eliminating coal-generated electricity." They noted that, although section 3(1) of the measure requires electric companies to "eliminate all coal-fired resources from [their] electricity suppl[ies]" by no later than 2030, section 2(d) defines "electricity supply" as "energy, capacity and other services supplied to and included in the electricity rates of retail electricity consumers in this state." Mr.

Bolton and Mr. Robertson thus observed that nothing in the measure "requires a utility to close a coal-generating facility or to stop generating or purchasing coal-fired electricity"; it instead requires electric companies to stop *charging* electricity consumers for coal-generated electricity.

We agree with that observation. We also agree with commenter Nik Blosser (represented by Steven Berman) that use of the word "eliminating" might create the misimpression that electric companies, upon passage of the proposed measure, would be required to immediately stop charging consumers for coal-generated electricity; in fact, the proposed measure requires companies to eliminate such sales by 2030 at the latest.

As a result, we have amended the caption so that, instead of stating that the proposed measure "requires eliminating coal-generated electricity," it states that the measure "phases out coal-generated electricity sales."

Proposals that we did not adopt for the caption:

Commenter Paul Cosgrove (represented by Jill Gibson) stated that "the [ballot title's] failure to put 'renewable sources' in quotation marks [and to follow it with a parenthetical reading '(defined)'] renders the caption misleading and overinclusive." Commenters Bolton and Robertson made a similar statement. We have declined to adopt Mr. Cosgrove's suggestion to use the phrase "'renewable sources' (defined)." The caption's reference to "renewable sources" is shorthand for "renewable energy sources," a phrase that *already* has been defined by the legislature. Because a parenthetical that reads "(defined)" generally connotes that the proposed measure itself defines the phrase at issue, using such a parenthetical in this case might only mislead voters into thinking that the proposed measure—as opposed to existing law—defines "renewable [energy] sources." *See Carley/Towers v. Myers*, 340 Or 222, 229, 132 P3d 651, 655-56 (2006) ("this court has approved the use of specially defined terms in quotation marks, followed by the word 'defined' in parentheses, to signal that the proposed measure specially defines the terms"). (We note, however, that we have modified our summary's description of current law to clarify that the phrase "renewable energy sources" is "defined by current law.")

We declined to adopt four additional suggestions made by commenters Bolton and Robertson:

(1) They stated that the caption should make it clear that the proposed measure does not affect "all producers of electricity." We do not believe, however, that voters would necessarily understand the caption to mean that the measure would affect all electricity producers. Even if the caption is ambiguous on that point, the summary clarifies which utilities would be affected.

(2) They stated that neither the caption nor the rest of the ballot title informs voters that, under current law (and under the proposed measure as well), utilities are exempt from satisfying the renewable-sources requirements if compliance is too expensive (as assessed under a formula set out in ORS 469A.100(1)). But because the proposed measure does not alter that aspect of current law, we have chosen not to describe that aspect in the ballot title. (We have, however, altered the summary so that it more accurately states that "current law *generally* requires that"

particular percentages of electricity sold by certain utilities must come from renewable energy sources (emphasis added)).

(3) They stated that the caption gives the "misimpression that the requirement to eliminate coal-generated electricity from rates applies to all producers of electricity," when in fact it applies to "electric companies" only. The caption does not, however, state that the requirement at issue applies to all electricity producers. To the extent that the caption is ambiguous on that point, any ambiguity is clarified by the "yes" result statement and summary, which identify "electric companies" as the affected entities.

(4) They stated that "[t]here is only one coal-fired facility in Oregon, the Boardman Plant," that the plant is already scheduled to stop using coal by the end of 2020, and that "[v]oters are entitled to know that the deadline IP 63 offers [thus] may be nothing more than a symbolic gesture." But because ORS 250.035(2) provides that the caption's function is merely to describe the proposed measure's "subject matter," and because nothing in ORS 250.035 requires a ballot title to provide "factual" information that appears neither in the proposed measure nor in existing statutory provisions, we have declined to insert information about the Boardman Plant in the certified ballot title.

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 minimum percentages of retail electricity sales that must come from renewable sources; requires electric companies to eliminate coal-generated electricity by 2030.

Changes that we made to the "yes" result statement:

Each commenter noted that the draft ballot title does not refer to the proposed measure's effect on how "renewable energy certificates" (RECs) may be used. Under current law, when a utility produces more "qualifying electricity" than the law requires it to sell, it may obtain an REC to certify its surplus production, and it may use the REC to help satisfy its qualifying-electricity requirement in a future year. Current law also permits a utility to acquire an REC from another electricity supplier, and to then use the REC for its own purposes. Current law (ORS 469A.140(2)) permits a utility to use an REC indefinitely, and without any time limit. But under section 7(2) of the proposed measure, RECs must be used within three years. Commenters Bolton and Robertson proposed that the result statements should refer to that portion of the proposed measure, and we agree.

We have changed the "yes" result statement in a second way as well. Consistently with the change that we made to the caption, we have altered the "yes" result statement so that it more accurately reflects the proposed measure's requirement that electric companies will not be permitted to charge consumers for coal-generated electricity (although the statement no longer identifies the 2030 deadline for doing so, due to the insertion of information about the proposed new limits on use of RECs). We have also chosen not to use the word "eliminate." Hence, the "yes" result statement, instead of stating that the proposed measure "requires electric companies to eliminate coal-generated electricity by 2030," now states that the proposed measure "phases out electric companies' sales of coal-generated electricity."

Finally, commenter Blosser suggested that we delete the word "retail" from the phrase "retail electricity consumer." Because we do not think that using the word "retail" enhances voters' understanding of the measure, we have eliminated it.

Proposals that we did not adopt for the "yes" result statement:

Commenter Cosgrove proposed that the "yes" result statement should substitute "'renewable sources' (defined)" for the phrase "renewable sources." For the same reasons expressed already, we have declined to do so.

Commenters Bolton and Robertson stated that the "yes" result statement "carries forward the deficiencies of the draft caption." For the same reasons that we declined to adopt many of their suggestions for the caption, we declined to adopt those same suggestions for the "yes" result statement.

We also declined to adopt an additional suggestion made by Mr. Bolton and Mr. Robertson. They proposed that the "yes" result statement should "inform voters that a result of the passage of IP 63 will be an increase in rates charged for electricity." But as Mr. Bolton and Mr. Robertson also note, current law provides that, if the cost of compliance with the renewable-source requirements is too expensive, a utility is excused from compliance. Because whether rates will rise appears to be speculative, we do not believe that the ballot title is required to state that "an increase in rates" will result.

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 of retail electricity sales that must come from renewable energy; electric companies not required to eliminate coal-fired resources.

Changes that we made to the "no" result statement:

As with the "yes" result statement, we decided that it was appropriate to include information reflecting that the proposed measure would limit use of renewable energy certificates (RECs). We thus inserted information that a "no" vote would maintain a utility's ability, under current law, to use RECs regardless of their age. The certified "no" result statement informs voters that, if the proposed measure does not become law, "RECs do not expire."

Consistently with our modifications to the caption and "yes" result statement, we also modified the "no" result statement so that it reflects that the proposed measure ultimately will prohibit selling coal-generated electricity (and we deleted wording suggesting that the proposed measure prohibits coal-generated electricity itself). We also have chosen not to use the word "eliminate."

Proposals that we did not adopt for the "no" result statement:

The commenters made various suggestions for the "no" result statement that parallel suggestions that we declined to adopt for the caption and "yes" result statement. For the same reasons, we decline to adopt those suggestions with respect to the "no" result statement.

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 electricity to retail electricity consumers in an amount equaling at least 3% of all electricity sold to retail electricity consumers, current law requires that—for 2020-2024—at least 20% of the electricity that the utility sells to such consumers must constitute "qualifying electricity," defined as including electricity from renewable energy sources; for subsequent years, required minimum is 25%. Proposed measure would increase the required minimum to 22% for 2020-2024, 30% for 2025-2029, 40% for 2030-2034, 45% for 2035-2039, and 50% for subsequent years. Measure also would require electric companies to eliminate coal-generated electricity from their supplies by no later than January 1, 2030; some exceptions. Other provisions.

Changes that we made to the summary:

To make it clear that the phrase "renewable energy sources," as used in current law, is further defined by statute, we added the phrase "(defined by current law)" after the summary's reference to "'renewable energy sources.'"

Consistently with our changes to the result statements, we have added a description of current requirements that apply to RECs, and a description of the three-year time limit that the proposed measure would apply to RECs. To make room for that information, we condensed our description of the increases that the proposed measure would impose with respect to the percentages of renewable-source electricity that utilities must sell.

Consistently with changes elsewhere in the ballot title, we also modified our description of the proposed measure's requirements with respect to coal-generated electricity sales. Accordingly, the certified summary refers to the phasing out of sales of coal-generated electricity (rather than referring to a prohibition of "coal-generated electricity" itself). We also have chosen not to use the word "eliminate" in that description. At the same time, and in response to a suggestion from commenters Bolton and Robertson, we have deleted the words "some exceptions," which—in the draft summary—qualified our description of that portion of the measure.

Proposals that we did not adopt for the summary:

The commenters made various suggestions for the summary that parallel suggestions that we declined to adopt for the caption and result statements. For the same reasons, we decline to adopt those suggestions with respect to the summary.

Commenter Blosser also suggested that we place our reference to the "transition off of coal-generated electricity" earlier in the summary, to ensure that voters are not "distract[ed] * * * from" that portion of the measure. Given that the caption and both result statements describe that portion of the measure, and that the summary also describes it, we believe that the ballot title sufficiently alerts voters to the effect that the measure would have on sales of coal-generated electricity.

Commenters Bolton and Robertson also made some additional suggestions with respect to the summary, but we have chosen not to adopt them.

The certified summary reads:

> **Summary:** If a utility sells at least 3% of all electricity sold to consumers, current law generally requires that—for 2020-2024—at least 20% of the utility's electricity sales be "qualifying electricity," which includes electricity from "renewable energy sources" (defined by current law); for subsequent years, required minimum is 25%; to meet minimums, utility may use RECs (RECs are issued to utilities that produce more qualifying electricity than required, and may be sold/transferred between utilities). Proposed measure would increase required minimum to: 22% for 2020-2024, 30-45% for 2025-2039, 50% for subsequent years. RECs would expire after three years. Requires electric companies to phase out coal-generated electricity sales by 2030 at latest. 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, result statements, and summary. We certify the attached ballot title under ORS 250.067(2).

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Enclosure

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Jill Gibson
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1500 SW Taylor St.
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Certified by Attorney General on December 21, 2015.

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 that– for 2020-2024—at least 20% of the utility's electricity sales be "qualifying electricity," which includes electricity from "renewable energy sources" (defined by current law); for subsequent years, required minimum is 25%; to meet minimums, utility may use RECs (RECs are issued to utilities that produce more qualifying electricity than required, and may be sold/transferred between utilities). Proposed measure would increase required minimum to: 22% for 2020-2024, 30-45% for 2025-2039, 50% for subsequent years. RECs would expire after three years. Requires electric companies to phase out coal-generated electricity sales by 2030 at latest. Other provisions.

EXHIBIT 5

CERTIFICATE OF FILING

I hereby certify that I electronically filed the PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 63) with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on January 6, 2016.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 63) upon the following individuals on January 6, 2016, by delivering a true, full, and exact copy thereof via U.S. Mail to:

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

Nicholas Blosser
6330 SE 32nd Avenue
Portland, OR 97202

Margaret Ngai
5623 SE Insley St.
Portland, OR 97206

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

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

DATED this 6th day of January, 2016.

GIBSON LAW FIRM, LLC

/s/ Jill Gibson

Jill Gibson, OSB # 973581
Of Attorneys for Petitioner