



**COMMENTS OF PORTLAND GENERAL ELECTRIC COMPANY ON
THE OREGON DEPARTMENT OF ENERGY RULEMAKING
TO ESTABLISH RENEWABLE ENERGY CERTIFICATE TRACKING
AND A REPORTING SYSTEM PURSUANT TO SB 838 (2007)**

The Oregon Department of Energy (“department”) has published a Notice of Proposed Rulemaking to establish a renewable energy credit tracking and reporting system pursuant to Senate Bill 838 (2007) (“SB 838”). Portland General Electric Company (“PGE”) submits these comments in response to the proposed rules, Draft Rules #2, as posted on the department’s webpage, and in response to comments made by the department staff and others in testimony during the hearing held on 12/5/07.

PGE is an investor-owned utility serving approximately 790,000 customers, of which 691,000 are residential customers, in a 4,000 square mile service area. Because PGE makes annual sales greater than three percent of all electricity sold to retail electricity consumers in the state, PGE is required to comply with the large utility renewable portfolio standard requirements expressed in SB 838.

I. DATE OF RENEWABLE ENERGY CREDIT BANKING

After listening to arguments made during the hearing on December 4, 2007, reading the written comments submitted to the department, and reviewing SB 838 and our records of the development of the legislation, PGE believes that either January 1, 1995, or June 6, 2007, should be chosen as the date for initiating renewable energy credit (“REC”) banking, rather than the October 1, 2007, date specified in *proposed* OAR 330-150-0030. There is neither legislative nor significant logical support for choosing the date in the proposed rule. PGE believes that these two other dates have stronger legislative support than does the date in the proposed rule. Alternatively, PGE suggests that a date that is earlier than June 6, 2007, but after January 1, 1995, could be chosen in order to recognize early investments made in renewable generation while alleviating concerns that utilities would carry forward significant amounts of RECs from the earlier date.

The failure, in the crafting of SB 838, to include a date for the start of banking of RECs was an error that was well understood by interested parties during the legislative process. This error was compounded by a failure during the debate and consideration of SB 838 to fix the error or to provide clear legislative history as to what date should be chosen in the rulemaking. Adding to the difficulty in determining a date, contemporaneous recollections of parties instrumental in the crafting of SB 838 differ. However, in the absence of a specific date or unanimity among interested parties, it

seems that the department should look at what SB 838 does provide and resort to standard statutory construction rules.

a. January 1, 1995

Two well used maxims of statutory construction are that a state agency is not at liberty to restrict or limit the terms of a statute and that clear and unambiguous statutes must be construed according to their plain meaning. Phrased differently, in determining what REC system the rules should create, the department should look to the whole statute to determine what authority the department has and, if it is clear and unambiguous, create rules that adhere to the plain meaning of the statute.

Section 14 directs the department to “establish a system of renewable energy certificates that can be used” for compliance. Section 14 directs the department to consult with the Public Utility Commission (“PUC”) and allows the department to utilize a system developed by a regional entity like the Western Renewable Energy Generation Information System (“WREGIS”). The section also allows the department to allow the issuance, transfer and use of RECs in electronic form. Section 14 does not direct the department to choose a date for banking to begin, nor contain any provisions that could be considered to limit any other provisions of SB 838 – whatever system that the department creates must otherwise comply with the other provisions of SB 838.

Section 2 specifies, subject only to section 15’s provisions on bundled and unbundled RECs, that

Electricity generated from a renewable energy source may be used to comply with a renewable portfolio standard only if the facility that generates the electricity meets the requirements of section 3.

Section 3 provides, except as restricted in that section, that

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.

The January 1, 1995, date for inclusion of facilities that produce qualifying electricity was chosen during the debate on the bill as a careful balance between the desire to build new renewable generation facilities and the early investments that utilities had already made. The reason for using the January 1, 1995, was to reward utilities for making early investments in renewable energy sources while not extending so far back in history as to achieve the standard without changing the status quo.

In general, a legislative enactment should be construed liberally in order to carry out the purpose for which it is enacted and the best evidence of the legislature’s intent is the language of the statute. Allowing the banking of RECs from the date that facilities qualify would be in line with the legislative determination to allow those facilities to be

used to meet the renewable standard. It requires neither assumptions nor the addition of anything assumed to have been omitted. Read together, sections 2 and 3 provide a roadmap for the department to follow. Allowing the banking of RECs from the date that facilities qualify would be a reasonable interpretation that would carry out the purpose of the act.

In interpreting a statute for purposes of rulemaking, the department must give meaning to each provision of the statute and ensure that the interpretation is in harmony with the purpose of the enactment. To allow the banking of RECs from the date that facilities qualify would keep all of the provisions of SB 838 in harmony and would give meaning to all provisions. To choose another date would be to create conflict where there is none in the act.

In sum, including the RECs generated from all qualifying facilities would not restrict the plain meaning of SB 838, would not require the department to make a determination that it may not have the authority to make, would represent a reasonable interpretation of SB 838 that would be in line with the purpose for which it was adopted and would give harmonious meaning to all provisions of SB 838.

b. June 6, 2007

Another statutory maxim of construction is that, generally, statutes will not be considered to have retroactive effect unless the legislature's intent to the contrary clearly appears. Courts will view words of present and future tense as applying to situations existing and known at the time of enactment and prospectively to things and conditions that come into existence after the act's adoption. The text and context of the statute can be utilized to determine intent, including using grammatical clues such as verb tenses. But silence on the issue, specifically the lack of a retroactivity clause, strongly suggests that the legislature did not either intend for a statute to have retroactive applicability or, as is the case with SB 838, did not consider the issue.

Because the legislature did not specifically consider the issue, the department should look at the text and context of the statute to determine what the legislature meant for SB 838 to encompass. The bill does not contain any unusual phrasing or specific grammatical clues such as the use of past tense verbs that would provide for a retroactive application. The use of present tense verbs argues for an interpretation that applies SB 838 to situations existing and known at the time of enactment – the legislature knew that renewable generation facilities had already been built in the state and could generate RECs on the date of enactment. There certainly is no indication from the text and context that the legislature intended REC banking to start at some point in the future. Without more to go on, standard statutory construction would argue for a banking system that begins on the date that the bill became effective, applies to those facilities that are qualifying facilities on the date of enactment and applies prospectively to things and conditions that will come into existence after the act's adoption, such as new generation facilities.

SB 838 contained an emergency clause and became effective upon its passage, June 6, 2007. One of the reasons the legislature included an emergency clause was to allow utilities subject to have the maximum amount of time in order to begin making investment decisions that will allow for compliance with the renewable portfolio standard. To choose a date for banking to begin that is after the effective date of the act would shorten the period that the legislature gave utilities to comply even if utilities took action to comply immediately upon passage. The October 1, 2007, date proposed in the rule would essentially deprive utilities of nearly four months of RECs that have been generated.

c. Alternative date

The creation of SB 838 involved a series of compromises. Perhaps the resolution to the date question is similarly not a legal, but a political, resolution. While we believe that one of the two dates suggested above has more legal support, we also believe that a date between January 1, 1995, and June 6, 2007, if chosen, would recognize actions taken by utilities in preparation for the adoption of a renewable portfolio standard without significantly changing the pressures on utilities to prioritize the acquisition of renewable generation. Utilities, understanding that a renewable standard was likely to be adopted in the 2007 Legislative Assembly, may have made investment decisions – decisions regarding whether to hold on to RECs or sell them, based on that likely adoption. Furthermore, utilities may have begun to take a renewable standard into account in the integrated planning process while the debate was underway. These utilities should be reasonably recognized for their proactive stance.

While a later date for REC banking would require utilities to speed up investment decisions in order to meet compliance targets, an earlier date would reward those same utilities for making investments in renewable generation facilities long before those utilities were required to do so. The date of January 1, 2007, has been suggested by PUC staff in their comments. We believe that this date provides a good political compromise and we would support the department in choosing this date.

II. BRIDGING SYSTEM FOR RECS CREATED PRIOR TO ESTABLISHMENT OF WREGIS

Depending on the date established by the department for the banking of RECs created by qualifying facilities, WREGIS may not yet be available for the issuance and monitoring of those RECs. We concur with the testimony of Tom O'Connor during the December 4th hearing that the department should ensure that some form of “bridging” system be available to ensure that those RECs are adequately tracked for future inclusion in WREGIS. This bridging system may come from WREGIS itself, as the system may have the ability to track such RECs. If so, we believe it would be sufficient to ensure that WREGIS will have this capacity.

Thank you for the opportunity to comment at this time. We look forward to working with the department in the months to come.