BEFORE THE

PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of PORTLAND GENERAL ELECTRIC COMPANY, Investigation Into Proposed Green Tariff	)))))	UM 1953 - Phase II CALPINE ENERGY SOLUTIONS, LLC'S OBJECTION TO PORTLAND GENERAL ELECTRIC COMPANY'S DESIGNATION OF PROTECTED INFORMATION

INTRODUCTION AND SUMMARY

Calpine Energy Solutions, LLC ("Calpine Solutions") hereby submits its objection to Portland General Electric Company's ("PGE") designation of protected information under General Protective Order No. 18-260 to the Public Utility Commission of Oregon ("OPUC" or "Commission"). As explained below, Calpine Solutions objects to PGE's designation under Order No. 18-260 of the energy and capacity credit in PGE's revised compliance filing submitted on February 5, 2021. The energy and capacity credits are, in effect, the avoided cost to PGE of the supply of energy and capacity from the generation resource in the Green Energy Affinity Rider ("GEAR"). There is nothing commercially sensitive about a regulated utility's avoided costs. To the contrary, maintaining confidential treatment of the credit values defeats the principles of transparency and accountability that form the bedrock of effective regulation. The Commission should order removal of the confidential treatment of PGE's energy and capacity credits in the GEAR compliance filing.

BACKGROUND

Under the Commission's Order No. 19-075, PGE's GEAR program requires subscribing customers to pay the cost of the power purchase agreement ("PPA") from the GEAR resource,

but the subscribers receive an energy and capacity credit for the value of the supply from the GEAR resource to PGE. Under the approved provisions of the GEAR program, the energy and capacity credits may be forecasted and fixed for the PPA term or, in the case of the customer-supplied option, the credits may be floating and change over time (i.e., time-of-delivery valuation).[1] In the case where the credits are forecasted and fixed, PGE is authorized to levelize the credits, resulting in a single energy and capacity credit value.

In Order No. 19-075, the Commission adopted a specialized method of calculating the energy and capacity value distinct from other avoided cost calculations, such as those used for qualifying facilities and the resource value of solar. The Commission explained that the GEAR "has the potential to result a major acquisition of up to 300 MW of nameplate capacity" and therefore "the most accurate method for valuing capacity we can identify should prevail."[2] As approved, the GEAR tariff describes the energy credit valuation as "the energy value calculated using the AURORA model and the same methodologies described in the Integrated Resource Plan (IRP), updated with current assumptions."[3] The tariff describes the capacity credit valuation as "the value of capacity, calculated as described in PGE's IRP, at the time which the power purchase agreement (PPA) is executed."[4]

In any event, the energy and capacity credits are intended to reflect, in effect, the avoided cost of the GEAR resource to PGE. The underlying premise of the program is that the non-participants will be held harmless if the credit for the GEAR resource value is based upon an accurate estimate of the avoided costs to PGE of the resource's energy and capacity.

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1 Order No. 19-075 at pp. 4-6.
2 Order No. 19-075 at 7.
3 PGE's Schedule 55 at Sheet 55-1 (defining "Energy Value").
4 *Id.* (defining "Capacity Value").

PGE's GEAR tariff specifically invokes and references the avoided cost provisions of the Federal Energy Regulatory Commission's ("FERC") rules under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 18 CFR Part 292, as the conceptual basis for the credit calculation to be filed and subject to review before the Commission, stating as follows:

> The bill credit amount shall be determined by the Company (subject to regulatory review) consistent with applicable Oregon and federal law and regulation, including 18 C.F.R. § 292, using the Company's IRP methodology to determine the Capacity Value. The credit values for energy and/or capacity will be determined at the time of PPA execution, fixed over the term in which the renewable energy supplier delivers to the Company.
>
> The Company shall submit for regulatory review of the rate and credit calculations agreed upon by The Company and the Customer through a filing to the Staff of the OPUC.[5]

PGE's compliance filing at issue here regards PGE's customer-supplied PPA. The major substantive components of the compliance filing include the subscriber agreement, the calculation of the energy and capacity credits for the value of the resource's projected output, and the PPA price for the resource. PGE initially designated all of those components as highly confidential and subject to Modified Protective Order No. 20-302. Calpine Solutions and the Northwest and Intermountain Power Producers Coalition ("NIPPC") informally objected to PGE's designation of the credit calculation and supporting data as highly confidential, and further requested that the final value of the energy and capacity credits should be public and not subject to any confidential protection. Subsequently, PGE made a revised compliance filing, dated February 5, 2021, in which it amended the confidentiality designation such that the energy and capacity credit calculation and supporting data is now designated as confidential information subject to General Protective Order No. 18-260.

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[5] *Id.* at Sheet 55-3.

But, though communication on February 9, 2021, PGE rejected Calpine Solutions and NIPPC's request to make the final energy and capacity credits public. Instead, PGE apparently maintains that those credits are qualified for protection under General Protective Order No. 18-260. For the reasons explained below, Calpine Solutions objects and maintains that the final energy and capacity credits should be public.

LEGAL STANDARD

Once a party challenges a confidential designation, the designating party bears the burden of showing that the challenged information falls within ORCP 36(C)(7).[6] The standard in ORCP 36(C)(7) provides that a court may limit disclosure of a "trade secret or other confidential research, development, or commercial information." Looking to the federal counterpart of ORCP 36(C)(7), the Oregon Court of Appeals has explained that the proponent of a protective order "must also establish good cause for the protective order by demonstrating that disclosure will work a clearly defined and serious injury."[7] Further, "[b]road allegations of harm unsubstantiated by specific examples or articulated reasoning do not satisfy the good cause requirement."[8] Additionally, "[t]he harm must be significant, not a mere trifle."[9] In the context of utility regulatory proceedings, the Commission must also protect the bedrock principle of transparency in utility regulation. As the National Association of Regulatory Commissioners ("NARUC") has aptly explained in a primer on utility regulation:

> It is vital that the regulator have access to the greatest practicable amount of information about the utility's revenues, investments and costs. *Moreover, it is important that this information be available to the public. The failure to obtain,*

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6 Order No. 18-465 at 7.

7 *Citizens' Util. Bd. v. Or. Pub. Util. Comm'n*, 128 Or. App. 650, 658, 877 P.2d 116, 122 (1994) (internal quotation omitted).

8 *Id.*

9 *Id.*

and make public, such information would compromise the transparency and accountability essential to good regulation.[10]

NARUC's primer carves out only the possibility of preventing disclosure of information that presents a security risk or could give a utility's competitors and unfair advantage.[11]

ARGUMENT

The Commission should view PGE's claims of confidentiality with a skeptical eye and compel PGE to make the GEAR program credits public. The credits are important data points both for evaluating PGE's calculations in this compliance filing and, perhaps even more importantly, for providing stakeholders, potential suppliers, and the Commission itself with important data points in the future. PGE has not provided, and cannot provide, any basis to conclude it will suffer a "clearly defined and serious injury" if the credit values are made public.[12]

As confirmed by PGE's own GEAR tariff, the energy and capacity credits at issue are, in effect, nothing more than a calculation of PGE's avoided costs for supply of the GEAR resource. This objection does not seek any confidential or proprietary data supplied by the developer or owner of the GEAR resource. It does not seek the developer's underlying output profile be made public. Nor does this objection seek to make public the GEAR PPA or its price. It does not seek any proprietary data of PGE, such as a proprietary fuel cost forecast or preliminary analysis that might somehow impact ongoing negotiations.[13] All that is at issue is the final credit values based

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[10] NARUC, *Regulatory Accounting: A Primer for Utility Regulators*, at p. 21 (Dec. 2019), https://pubs.naruc.org/pub.cfm?id=EE6402E5-155D-0A36-31F8-36FEBB6D4E44.

[11] *Id.* at p. 21 n. 7.

[12] *Citizens' Util. Bd.*, 128 Or App at 658 (internal quotation omitted).

[13] *See* Order No. 18-465 at 8-10 (shielding certain coal plant costs from disclosure because they were only preliminary and disclosure could impair utility's ongoing negotiations with pollution control regulatory agencies and with third-party contractors; but noting that PacifiCorp publicly released final

on the Commission-approved IRP method rate calculation. Making that credit public will assist all parties and the Commission in evaluating and comparing the unique method adopted to calculate avoided costs for the GEAR. On the other hand, in the words of NARUC, "failure to obtain, and make public, such information would compromise the transparency and accountability essential to good regulation."[14]

In the context of avoided costs, FERC's regulations *require* that the utility's avoided cost data must be made publicly available, strongly undermining PGE's claim that its own avoided costs should be considered confidential.[15] Indeed, the rates calculated through an avoided cost methodology for a specific facility are regularly subject to public disclosure.[16] PacifiCorp recently filed indicative non-standard avoided cost rates proposed for a qualifying facility as a public exhibit in an Oregon proceeding.[17] Treating such information as confidential would require any litigated proceeding to establish avoided cost rates for a specific project to result in a Commission order that redacts the final outcome of the dispute – a practice that has never occurred in the undersigned counsel's extensive experience litigating PURPA disputes. Instead, state utility commission orders commonly include the final avoided cost rate offered to the qualifying facility as calculated or approved by the state utility commission.[18]

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analysis of such costs).

[14] NARUC, *Regulatory Accounting: A Primer for Utility Regulators*, at p. 21 (Dec. 2019), https://pubs.naruc.org/pub.cfm?id=EE6402E5-155D-0A36-31F8-36FEBB6D4E44.

[15] 18 CFR § 292.302(b) (requiring "each regulated electric utility" to "maintain for public inspection" certain data regarding avoided costs).

[16] *See, e.g., In the Matter of Power Purchase Agreement Between PacifiCorp and Pioneer Wind Park 1, LLC*, Wyoming Pub. Serv. Comm'n Docket No. 20000-450-EK-14, 2014 Wyo. PUC LEXIS 265, *5-6 (Wyo. P.S.C. September 3, 2014) (noting that, after objecting, developer "agreed that any information related to rate payer indifference, avoided cost and the pricing in the agreement could be publicly disclosed").

[17] *See Declaration of Bruce Griswold In Support of PacifiCorp's Response to Dalreed Solar LLC's Motion for Summary Judgment*, at Attachment B, p. 3, Docket No. UM 2125 (Jan. 19, 2021).

[18] *See, e.g., In the Matter of Application of Idaho Power Co. for Approval or Rejection of an Energy*

Shielding the utility's avoided costs only bolsters the utility's monopsony position by increasing the informational advantage that the utility possesses in the market. For that reason, in an analogous context, this Commission's competitive bidding rules for acquisition of major generation facilities require the utilities to publicly file the average bid score and average price of the resources on the final shortlist after conclusion of competitive solicitations.[19] Of course, the request in this objection is not for the bidder's information, but is rather for the credit calculated for the value of its projected output, which is in effect nothing more than a calculation of PGE's own avoided costs.

Additionally, making the credit value public will provide an important data point to the market participants who may seek to develop future VRET resources. The credit is the value against which the PPA price is netted and is therefore a critical data point against which a GEAR resource supplier will try to compete to reduce the overall rate charged to subscribers in program. When Calpine Solutions attempted to develop a customer-supplied PPA proposal, it faced the inability to meaningfully ascertain a ballpark value of the credit that would likely be provided, and PGE declined to provide such an estimate to assist Calpine Solutions. Making the actual credit offered public will assist Calpine Solutions and other potential suppliers with an important benchmark for use in future development efforts under the GEAR program or other similar

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Sales Agreement with Grand View PV Solar Two, LLC for the Sale and Purchase of Electric Energy, Idaho Pub. Util. Comm'n Case No. IPC-E-14-19, Order No. 33179, 2014 Ida. PUC LEXIS 139, *7 (Nov. 14, 2014) (approving agreement that contained non-standard avoided costs calculated based on project's generation forecast in the utility's "IRP Methodology" with an "equivalent 20-year levelized avoided cost rate [that] would amount to approximately $73.41/MWh"); *In the Matter or Petition of Crazy Mountain Wind for the Commission to Set Certain Terms and Conditions of Contract between NorthWestern Energy and Crazy Mountain Wind, LLC*, Montana Pub. Serv. Comm'n Docket No. D2016.7.56, Order No. 7505b, 2016 Mont. PUC LEXIS 48, *77 (Mont. P.S.C. December 22, 2016) (stating: "The Commission adopts a total all-hours rate of $ 36.36/MWh for Crazy Mountain, plus a capacity rate of $ 6.02, to be applied only in heavy load hours in January, February, July, August, and December").

[19] OAR 860-089-0500(5).

programs PGE may develop.

Without making the value of the credit public in this proceeding and by endorsing this type of overly broad designation of information as confidential in general, Calpine Solutions' ability to participate in Commission proceedings is compromised. Employees of Calpine Solutions generally abstain from entering into the General Protective Order to avoid possessing potentially sensitive commercial information. Therefore, over-designations of information under the General Protective Order impair Calpine Solutions' ability to effectively participate in Commission proceedings. In this particular case, it was not possible to effectively communicate regarding the compliance filing with persons who do not execute the Commission's General Protective Order, thus thwarting effective evaluation of the compliance filing in this case, as well as any potential alternative proposals for how to calculate such credits in future VRET proceedings or other related proceedings, such as direct access proceedings.

In sum, the GEAR credit value does not qualify for protection, and the Commission should not allow PGE to use such unjustified designation to impair other parties' participation in this proceeding, future related proceedings, or the markets regulated by the Commission.

CONCLUSION

For the reasons explained above, the Commission should order removal of the confidential treatment of PGE's energy and capacity credits in the GEAR compliance filing.

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