BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1953

In the Matter of	)	
	)	
PORTLAND GENERAL ELECTRIC COMPANY	)	INITIAL BRIEF OF NORTHWEST & INTERMOUNTAIN POWER PRODUCERS COALITION
	)	
Investigation into Proposed Green Tariff Phase II	)	

Pursuant to the procedural schedule adopted by the Commission in this Docket, the Northwest and Intermountain Power Producers Coalition ("**NIPPC**") submits its initial brief for Phase II of the Commission's Investigation into Portland General Electric Company's ("**PGE**") voluntary renewable energy tariff ("**VRET**"). This second phase of the VRET docket addresses two interrelated topics: (1) PGE's proposed expansion of its Green Energy Affinity Rider ("**GEAR**") VRET program and (2) a series of larger policy issues regarding the VRET program in general that were not addressed Phase I, [1] including whether the Commission should modify the specific series of protections known as the "Nine Conditions"[2] that the Commission required to be met as a threshold for any VRET program to be considered consistent with the public interest.

NIPPC submits that the Commission must not fundamentally weaken the market protections set forth in the original Nine Conditions, particularly with respect to Conditions 6, 7, and 8 – the "Mirror Condition," limitations on utility ownership of a VRET resource, and

[1] Issues expressly identified for Phase 2 include "credit calculation, reassessment of previously adopted conditions, the participation limitations of any bring-your-own PPA program, VRET interactions with Oregon's Direct Access Program, and other policy issues as identified by parties in the course of the investigation." *Investigation into Proposed Green Tariff*, Docket UM 1953, Order 19-075 (March 5, 2019), Ordering Paragraph 2. ("**Order No. 19-075**")

[2] The "Nine Conditions" were set out In the Matter of Public Utility Commission of Oregon, Voluntary Renewable Energy Tariffs for Non-Residential Customers, Docket No. UM 1690, Order No. 15-405 (Dec 15, 2015) and are discussed in greater detail below.

ensuring no cost shifting, respectively.[3] Doing so would be contrary to the Commission's statutory obligations and could significantly reduce Oregon's ability to decarbonize its electricity supply on a cost-effective basis. As detailed below, NIPPC will show that:

(1) **Changes to the Pacific Northwest power markets in recent years do not fundamentally modify the competitive conditions in the region or justify eliminating the program design protections included in the original VRET program.** While there have been changes to the Pacific Northwest power markets in recent years, these changes do not fundamentally alter the competitive landscape for electric power sales, nor do they change the Commission's statutory obligation to facilitate development of the competitive retail market for power.

(2) **In crucial respects, Direct Access and the VRET are directly competing programs, each of which can support decarbonization of the electric grid in Oregon.** Contentions made by PGE and others that the VRET and Direct Access Programs are for "distinctly different customers"[4] are not accurate,[5] even in cases when a utility offers service based on a "cost of service" rider or otherwise. Direct Access competes directly with utility-offered VRET services to provide low-carbon power to some customers in Oregon. Skewing the competitive landscape by removing or limiting the effectiveness of the existing VRET conditions will reduce the opportunity to decarbonize Oregon.

(3) **The Protections of Mirror Condition 6 Must Be Maintained.** PGE is proposing to prevent energy consumers from being able to choose between VRET service offered by a utility and Direct Access offered in the competitive market. PGE's actions make it clear that the rationale behind Condition 6 remains necessary to prevent market power abuse by incumbent utilities. To the extent the Commission believes that a modification of the Mirror Condition with respect to a specific VRET program (such as PGE's GEAR program) is appropriate, the Commission should only do so by granting limited waiver on a case-by-case basis, and only to the extent the utility is able to show, with express evidentiary support, that:

   a. a given term or condition of service *cannot reasonably be implemented* under Direct Access;

[3] NIPPC takes no position with respect to proposed changes to conditions 1 through 4, and understands that no party is proposing changes to conditions 5 or 9. As such, this brief focuses on conditions 6, 7 and 8.

[4] *See, e.g.*, PGE/500 Page 21, lines 14-23; PGE/700, Wenzel-Haley/11, lines 7-9.

[5] *See* NIPPC/300 at 11-14

b. the utility has presented a *compelling rationale* for why different terms and conditions are necessary for the program to function; and

c. the different treatment *does not create barriers to the competitive market*, such as creating a category of customer that is eligible for service under the VRET but ineligible to receive service under Direct Access.

(4) **The Protections of Condition 7 (Limitations on Utility Ownership of VRET Resources) must be maintained**. The Commission should expressly reject PGE's proposal that it be allowed to include a VRET resource in its rate base. Allowing a utility to include a VRET resource in its rate base will reduce, if not eliminate, opportunities for other entities to provide competing products—this ownership would allow the IOUs to mitigate financial risks in ways that non-IOU entities are unable to emulate. Simply stated, allowing utilities to rate base these resources would help preserve, rather than reduce, their horizontal and vertical market power, create an unequal playing field, and stifle competition. Utilities remain free to form affiliates to own non-rate-based resources and compete for customers if they so desire.

(5) **The Protections of Condition 8 (No Cost Shifting) must be maintained**. PGE already appears to be subsidizing its VRET program to the detriment of non-participating customers and the retail marketplace. Further protections are needed to ensure that PGE does not attempt to recover costs of excess capacity resulting from the VRET program through transition charges that could be imposed on its Direct Access program.

(6) **PGE's request for a generic waiver of competitive bidding rules must be rejected.** The Commission has already determined that the competitive bidding rules apply to the VRET program and has a mechanism in place for a utility to seek waiver of those rules where it can provide a factual predicate demonstrating a reasoned need for waiver. There is no reason to "pre-grant" such waiver without regard to facts and circumstances that may exist at a later date. Under no circumstance should waiver of the competitive bidding rules be permitted where PGE will own (or will have a contractual right to own) a VRET resource.

(7) **PGE's Risk Premium Proposal Allows for Double Recovery of Costs and should be modified**. PGE is seeking recovery of a risk premium from GEAR customers that protect PGE's shareholders from underrecovery from certain risks, but seeks to retain any excess revenue if market circumstances differ. Retention of such revenue is not appropriate for a regulated utility that already receives an allowed rate of return on rate base calculated to include a risk component.

I. BACKGROUND

This proceeding addresses PGE's proposal to implement a form of VRET known as PGE's GEAR program. Under the GEAR program, customers desiring to do so would be able to contract for 100 percent renewable energy on a "cost-of service-plus" basis, meaning such customers would continue to pay cost of service rates, and pay an additional rider to cover costs for PGE to acquire additional renewable energy resources.

As described below, in seeking approval for its GEAR program, PGE also sought modifications and clarifications of the Commission's VRET policies, including modifications to the "Nine Conditions" the Commission previously found to be necessary in order for a VRET offered by a utility to be in the public interest.

In Phase 1 of this proceeding, the Commission approved a limited version of PGE's GEAR proposal. In doing so, however, the Commission rejected calls to modify the Nine Conditions at that time, pending a more fulsome analysis of issues in this Phase II proceeding. The Commission expressly did not make a predetermination as to whether modifying the Nine Conditions would be appropriate. Instead, the Commission found that "[w]e see a need to assess changes in Oregon's competitive electricity supply market and in the renewable energy development marketplace since 2016 as part of a reconsideration of the Nine Conditions"[6] in the second phase of this proceeding. Issues expressly identified for Phase II included "credit calculation[s], reassessment of previously adopted [nine] conditions, the participation limitations of any bring-your-own PPA program, VRET interactions with Oregon's Direct Access Program, and other policy issues as identified by parties in the course of the investigation."[7]

This Phase II proceeding, therefore, applies to the specific GEAR program proposed by PGE. At the same time, issues raised in this proceeding also apply to the Commission's VRET program as a whole, and are not limited to the specifics of PGE's GEAR proposal.

[6] Order No. 19-075, page 8.

[7] Order 19-075, Ordering Paragraph 2

II. APPLICABLE LAW

Evaluation of PGE's proposal and the VRET program in general must start with the legal backdrop in Oregon, including **(1)** Oregon's longstanding Direct Access laws, codified in Chapter 17, Section 757.600 through 757.689 of Oregon's Revised Statutes; **(2)** HB 4126 (2014), in which the legislature directed the Commission to consider whether to allow utilities to offer a VRET; and **(3)** the Commission's determinations in Docket UM 1690, opened in response to HB 4126 and culminating with Order No. 15-405.

The law specifies that the Commission's duties expressly include "***developing policies to eliminate barriers to the development of a competitive retail market structure,***" including policies which "***shall be designed to mitigate the vertical and horizontal market power of incumbent electric companies***."[8] The Direct Access program allows interested commercial and industrial customers the opportunity to purchase renewable or low carbon energy from an Electricity Service Supplier ("**ESS**"). Direct Access customers (and/or their ESSs) remain customers of the local utility with respect to transmission services, pay for their share of the electric grid, are subject to the same renewable portfolio standard requirements as the utilities,[9] pay the same public purposes charges,[10] and are subject to a wide variety of other charges and supplemental riders.[11]

[8] ORS 757.646(1) (emphasis supplied).

[9] ORS 469A.050 (2).

[10] 860-038-0480.

[11] For example, Direct Access on PGE's system is subject to the following supplemental riders: • Schedule 105 – Regulatory Adjustments (miscellaneous nonrecurring items such as gains from property transactions); • Schedule 106 – Multnomah County Business Income Tax Recovery; • Schedule 108 – Public Purpose Charge; • Schedule 110 – Energy Efficiency Customer Service; • Schedule 112 – Customer Engagement Transformation Adjustment (related to PGE's updates of its Customer Information System and Meter Data Management System); • Schedule 115 – Low-Income Assistance; • Schedule 126 – Annual Power Cost Variance Mechanism; • Schedule 131 – Oregon Corporate Activity Tax Recovery; • Schedule 132 – Federal Tax Reform Credit; Schedule 134 – Gresham Retroactive Privilege Tax Payment Adjustment (for customers in the City of Gresham); • Schedule 142 – Underground Conversion Cost Recovery Adjustment (applicable in certain municipalities); • Schedule 143 – Spent Fuel Adjustment (Trojan nuclear plant decommissioning costs); and • Schedule 149 - Environmental Remediation Cost Recovery Adjustment Automatic Adjustment Clause (related to the Portland Harbor Superfund site and others). Direct Access providers on PacifiCorp's system are subject to similar requirements.

The laws of Oregon also includes HB 4126 (2014), in which the legislature directed the Commission to consider whether to allow utilities to offer a VRET, including directing the Commission to expressly consider the effect of allowing electric companies to offer voluntary renewable energy tariffs on the development of a competitive retail market.[12] The Commission ultimately determined that it would be in the public interest for Oregon utilities to offer a VRET, but *only* if the VRET met robust requirements to protect the competitive retail market and nonparticipating customers. Specifically, in Order No. 15-405, the Commission determined that such program would only be in the public interest if it satisfied a series of conditions, known as the "Nine Conditions" that protected the competitive marketplace. Among the fundamental protective conditions are Condition 6, the "Mirror Condition", which assured that a utility-offered VRET and competitive Direct Access offerings would be available on an equivalent basis;[13] Condition 7, the "Ownership Condition", which prohibited a utility from including a VRET resource in rate base,[14] and Condition 8, the prohibition on cost shifting, which specifically noted that the VRET should not shift stranded costs to non-VRET participants.[15]

In the Phase I Order of this proceeding, the Commission noted that it saw "a need to assess changes in Oregon's competitive electricity supply market and in the renewable energy development marketplace since 2016 as part of a reconsideration of the Nine Conditions,"[16] but did not make a determination that any of the conditions should be changed.[17]

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[12] HB 4126 (2014) Section 3(3)(a).

[13] Order No. 15-405, Condition 6, specifies: "VRET terms and conditions (including the timing and frequency of VRET offerings), as well as transition costs, ***must mirror those for direct access***. PGE and PacifiCorp ***may propose VRET terms and conditions that differ from current direct access provisions but must propose changes to their respective direct access programs to match those changes***." (Emphasis supplied.)

[14] Order No. 15-405, Condition 7, specifies: "The regulated utility may own a VRET resource, ***but may not include any VRET resource in its general rate base***. It may recover a return on and return of its investment in the VRET resource from the VRET customer; however, the utility ***must share some of the return on with other utility customers for ratepayer-funded assets used to assist the VRET offering***" (Emphasis supplied.)

[15] Order No. 15-405, Condition 8, specifies: "All direct and indirect costs and risks are borne by the VRET customers, shareholders of the utility, or third-party developers and suppliers with provisions allowing independent review and verification by the Commission Staff of all utility costs. ***Costs include but are not limited*** to ancillary services and ***stranded costs of the existing cost of service rate based system***." (Emphasis supplied.)

[16] Order No. 19-075, page 8.

[17] NIPPC/300 at 10.

III. DISCUSSION

A. Changes to the Pacific Northwest power markets do not fundamentally modify the competitive conditions in the region or justify eliminating the protections included in the original VRET program to ensure such programs be consistent with the public interest.

There have been numerous changes to both the power market and the renewable energy marketplace since the Commission found that a VRET only would be in the public interest if the Nine Conditions were met -- but such changes do not fundamentally alter the structure of the Oregon power market, or the renewable power market, and such changes do not in any way reduce the need for protection for competition in these markets. The retail marketplace continues to need (and the Commission is legally obligated to develop) policies to facilitate development of the retail power market in Oregon and protection from monopoly power of incumbent utilities.[18] As succinctly stated on the record,

> "the existence of significant events in the world and in the power sector in general does not change the underlying facts that led the Commission to adopt the conditions we are discussing today."[19]

For example, the record reflects that there has been an increase in customer desire for renewable energy.[20] But this growing appetite by energy consumers for low-carbon power increases, rather than decreases, the need for competitive protections to ensure a fair and competitive retail marketplace. This increased customer demand does not change the structure of the Oregon power market,[21] nor the need for conditions to ensure a VRET does not act to harm development of competition. The same can be said for the increase in Oregon's RPS requirements. Direct Access service suppliers and Oregon's monopoly utilities face the same RPS requirements, including the obligation to reach the 50 percent renewable power threshold and limitations on importation of power from a coal-fired resource set out in the Oregon Clean Electricity & Coal

[18] Tr. 27 lines 1-6.

[19] Tr 27, lines 7-13.

[20] NIPPC/300 p. 7.

[21] Tr 26, lines 23-25.

Transition Plan included Senate Bill 1547B.[22] The fact that these requirements have increased for both sets of competitors does not change the competitive playing field nor does it change the need for market protection.

This analysis similarly applies to the Oregon's increased commitment to decarbonization, as evidenced by the Governor's Executive Order No. 20-04.[23] Both the VRET program and Direct Access can facilitate decarbonization of the state power grid. Both programs facilitate providing electricity customers the opportunity to purchase low-carbon power – and these programs directly compete to do so.[24] Nothing about Oregon's desire to decarbonize changes the competitive dynamic between the utilities and competitive Direct Access service suppliers; in fact, assuring that Direct Access has a fair opportunity to compete with utility service creates the state's best opportunity to decarbonize its electricity supply in the most efficient, innovative, and cost effective ways.

The same can be said for each of the other changes in the market identified by various parties to this proceeding. As the record reflects, "[t]he fundamental position of Portland General as a vertically integrated utility with monopoly power in the market hasn't changed, and the ability of customers, existing cost-of-service customers of Portland General, their monopoly utility to move from their current cost-of-service tariff for existing loads to an alternative retail choice hasn't changed either."[25] Simply stated, the protections engrained in the Nine Conditions remain as relevant as ever.

B. Direct Access and VRET Programs (including PGE's GEAR) directly compete to provide low-carbon generation to retail customers in Oregon.

Direct Access and VRET programs directly compete to provide low-carbon power to interested commercial and industrial customers. Both programs can offer low carbon power to

[22] Senate Bill 1547 (2016).

[23] Brown, Kate. "Executive Order No. 20-04." Office of the Governor. State of Oregon. 10 Mar 2020. Retrieved July 16, 2020 from https://www.oregon.gov/gov/Documents/executive_orders/eo_20-04.pdf

[24] NIPPC/300, p. 5, line 11- p. 9, line 3.

[25] TR 27, lines 1-6.

eligible customers.[26] Both programs can support Governor Brown's Executive Order No. 20-04 facilitating decarbonization of Oregon's electric grid.[27] Each program can provide such service to municipalities, industrial companies, chip manufacturers and other prospective customers. Each program can offer "bundled green energy products."[28] The record in this proceeding makes clear that Direct Access suppliers can and do provide 100 percent carbon-free power to customers choosing to purchase that product, and makes clear that commercial and industrial customers desire the opportunity to, and in fact do purchase, 100 percent carbon-free power from Direct Access suppliers.[29] This includes power from new renewable facilities added to the region expressly to provide such power to customers through Direct Access.[30]

As addressed in further detail in section II.C(a) below, the VRET and Direct Access Programs target many of the same customers, and the suggestion that they are for "distinctly different customers[31] is inaccurate.[32] These programs – Direct Access and VRET – directly compete to provide low-carbon power to many of the same customers in Oregon. Reducing the protections for the competitive marketplace that the Commission found necessary for a VRET to be in the public interest will decrease, rather than increase, the opportunity for customers to choose low-carbon power on a cost-effective basis, and is fundamentally inconsistent with Oregon's climate policy goals.

C. The Commission must maintain the protections for the retail market provided by the Nine Conditions.

The protections for the retail market provided by the Nine Conditions remain necessary. To the extent the Commission deems it appropriate to limit, modify or waive any of these fundamental conditions, it should minimize the changes. Where possible, any such change

[26] NIPPC/300, p. 5, line 11- p. 9, line 3.

[27] Executive Order No. 20-04, *supra*.

[28] Tr. 7 line 17-21; tr 9, lines 8-16.

[29] NIPPC/300, p. 7.

[30] NIPPC/300 at 7.

[31] *See*, *e.g.*, PGE/500 Page 21, lines 14-23; PGE/700, Wenzel-Haley/11, lines 7-9.

[32] *See* NIPPC/300 at 11-14

should be done through a limited waiver with respect to PGE's GEAR program, and not for a generic, undefined VRET that has yet to be brought forward and may be significantly different than PGE's GEAR program. In all cases, the Commission should ensure that the fundamental protections set forth in Conditions 6, 7, and 8 – the Mirror Condition, limitations on utility ownership of a VRET resource, and ensuring no cost shifting, respectively -- remain intact or strengthened.

a. The Protections of Mirror Condition 6 Must Be Maintained

Condition 6 specifies that:

> "VRET terms and conditions (including the timing and frequency of VRET offerings), as well as transition costs, ***must mirror those for direct access***. PGE and PacifiCorp may propose VRET terms and conditions that differ from current direct access provisions but ***must propose changes to their respective direct access programs to match those changes***."

In approving the VRET program, the Commission included the limitations set out in Condition 6 to prevent a utility from offering services unavailable to be offered by Direct Access providers. In doing so, the Commission offered a pragmatic approach: it allowed utilities to offer something not currently available to under the utility's Direct Access tariffs, provided that the utility "***must***" propose changes to their respective Direct Access programs to match those changes. NIPPC supports this reasonable approach: the Commission did not limit a utility's opportunity to proactively develop a new renewable product; rather, it attempted to make sure that the retail market could compete to offer that product as well.

The Mirror Condition remains necessary because any VRET program under which a utility can offer terms and conditions of service that allow the utility to provide service to a customer or class of customers but deny that opportunity to Direct Access providers (1) creates a clear and definite barrier to development of the competitive retail market and (2) enhances the utility's vertical and horizontal market power. Such action would also limit, rather than promote, opportunities for decarbonization of Oregon's electric sector on a cost-effective and efficient basis.

PGE and PacifiCorp now seek to eliminate Condition 6, but offer no legitimate basis for doing so nor alternative solution that would be consistent with the Commission's statutory mandate and Oregon's existing legal framework. The contentions made by PGE and others that VRET and Direct Access Programs are for "distinctly different customers[33] are inaccurate.[34] For example, some parties argue that Condition 6 should not apply where the VRET product is a "cost of service plus" product.[35] But the fact that a given VRET product charges cost of service with an additional rider does not change the fact that such service remains in direct competition with Direct Access for some customers, and allowing the utilities to provide such service while simultaneously preventing Direct Access providers from offering a competing service is inconsistent with law and serves to limit, rather than expand, the opportunities for decarbonization of Oregon's electric market. PGE makes it clear that a customer may desire to choose cost-of-service for reasons that have nothing to do with green offerings,[36] and that whether or not PGE's GEAR program is cost of service plus is simply among the considerations for a customer "deciding under retail choice which [] option they want to go with."[37]

The concept that a "cost of service"-based product would should be treated differently also invites confusion and disputes.[38] Indeed, determining whether a tariff is "cost-of-service" based will not be transparent, and an argument could easily be made by PGE that any PGE-offered VRET is cost-of-service based. For example, PGE could contend that cost-of-service could include market-supplied products procured by PGE or products that include credits that result in the customer paying less than the normally applicable non-VRET cost-of-service tariff.[39]

[33] See, e.g., PGE/500 Page 21, lines 14-23; PGE/700, Wenzel-Haley/11, lines 7-9.

[34] See NIPPC/300 at p. 11-14

[35] See, e.g., PGE/701, Wenzel Halley 24.

[36] TR. 57, lines 15-24.

[37] TR 58, lines 1-9.

[38] NIPPC/300 p. 20.

[39] NIPPC/300 p. 20.

As another example, some parties argue that application of the Mirror Condition would require a utility to modify its tariff to limit, rather than enhance, its Direct Access offerings to equal any limitation contained in a VRET offering.[40] This argument is a red-herring: the Mirror Condition is clearly intended to apply to the extent a VRET proposal offers terms and conditions that are more flexible or favorable than those available under the competing Direct Access program, and not intended as a tool to allow utilities to further entrench their monopoly power by limiting retail options. To the extent the Commission finds it appropriate to modify Condition 6 at all, it should specify that this condition applies to the extent a utility offers any VRET terms and conditions that are "more flexible or favorable to" the terms and conditions.

Indeed, PGE's own actions in this proceeding demonstrate why the Mirror Condition must be maintained. PGE has made it expressly clear they are seeking authority to expand a program under which PGE, and only PGE, is able to serve certain categories of customers– despite the clear statutory directive that retail customers are supposed to have the ability to purchase power from a supplier of their choice on the competitive market. For example, PGE has proposed a GEAR program that allows it to serve prospective customers with loads as low as 30 kW,[41] but does not allow customers to take long-term Direct Access unless they have a load of at least 1 MW. Thus, all customers between 30 kW and 1 MW are "locked out" from purchasing long-term Direct Access. Similarly, Direct Access customers and ESSs are, in fact, "locked out" from respectively receiving or offering a service competing with PGE's VRET to the extent the long-term Direct Access programs are at or near maximum capacity. Bear in mind that these limitations on Direct Access offerings available on PGE's system are tariff requirements put forth by PGE and not requirements of the Direct Access laws or regulations. PGE's response to NIPPC's contention PGE should be required to abide by Condition 6 with respect to the eligibility threshold is especially telling: PGE incorrectly states that parity between its VRET program and Direct Access would require that the PGE Green Tariff change

[40] PGE/701, Wenzel-Halley/20, lns 10-15.

[41] *See* PGE Original Sheet No. 55-2 ("This schedule is available – subject to capacity made available within Phase I of the program to all Nonresidential Customers each of whose aggregate demand across all retail schedules exceeds 30kW. In the event that a Customer has multiple accounts – some of which may fall under 30kW of demand the Customer will be allowed to aggregate all Nonresidential accounts.")

so that it is available only to customers with the same 1 MWa load threshold that is applicable to Direct Access:

> "Changing this eligibility threshold would satisfy NIPPC's request, but the negative consequence of this would be that it leaves customers between 1 kW and 250 kW (with aggregate load of at least 1 MWa) with no option for directly driving decarbonization through additional renewable generation."[42]

PGE's response ignores the obvious alternative option. Rather than preclude customers with smaller loads from "driving decarbonization" through its VRET programs, PGE should be required to abide by Condition 6 and lower the eligibility threshold for long-term Direct Access to mirror the proposed threshold for the VRET.

PGE has provided no explanation as to why it cannot make this conforming change to its Direct Access program. If PGE were to simply make a matching update to its long-term Direct Access tariff, all customers eligible for the VRET program would then have two competing options for directly driving decarbonization. PGE acknowledges that reducing the Direct Access threshold to match the thresholds for the VRET program might increase options for customers interested in low-carbon power,[43] but claims the two programs are "unrelated."[44] *But the point of the Mirror Condition is to expressly relate these programs.* The Mirror Condition permits the utilities to propose a term or condition different from Direct Access, such as a different customer size threshold level, provided that they also "must propose changes to their Direct Access programs to match those changes." PGE's refusal to make a conforming change to its Direct Access program demonstrates why the Mirror Condition remains necessary today.

PGE's concerns with the other examples have the same flaws. For example PGE acknowledges that it allows a customer interested in taking a portion of its capacity through standard cost of service, and a portion of its capacity through a the VRET program to do so, thereby allowing a customer to just take a portion of its overall service as 100 percent renewable power. Yet PGE does not allow a customer interested in taking a portion of its capacity through

[42] PGE/701, Wenzel-Halley/20, lns 10-15.

[43] Tr. Page 52, line 6.

[44] Tr. Page 52, line 12.

standard cost of service, and a portion of its capacity through a the Direct Access to do so.[45] Again, PGE proposes terms and conditions for its VRET that it is unwilling to propose for Direct Access. There is no reason PGE should not be required to restore the ability to take partial requirement Direct Access service if it offers partial requirement VRET service.

Generally speaking, if PGE were to expand the terms and conditions it is proposing for its VRET to also apply for Direct Access, it would be increasing customer choice and facilitating the development of the competitive market. When PGE proposes to offer a more favorable opportunity for its own product than for competing products, it is impermissibly using monopoly power to lock out competition. PGE's reaction to the examples above demonstrates why the Mirror Condition must be retained.

NIPPC recognizes that there may be some circumstances where modifying a utility's Direct Access program to offer the exact opportunities and flexibilities of a given VRET proposal– *i.e.*, a full and identical "mirroring" – may be impossible, but that does not justify removing the protections intended by Condition 6 from the VRET program. Instead, the Commission should allow utilities to seek and obtain limited waivers of the Mirror Condition but only to the extent an applicant for such waiver can demonstrate , with express evidentiary support, that: 1) a given term or condition of service cannot reasonably be implemented under Direct Access; 2) the utility has presented a compelling rationale for why different terms and conditions are necessary for the program to function; and 3) that the different treatment does not create barriers to the competitive market, such as creating a category of customer that is eligible for service under the VRET but ineligible to receive service under Direct Access.[46]

Finally, as a side note, NIPPC notes that both PacifiCorp and PGE previously proposed to eliminate Condition 5,[47] which specifies that a VRET product design should be sufficiently differentiated from existing Direct Access programs, but no longer propose to eliminate this

[45] Tr. Page 52, line 10 to page 53, line 7.

[46] NIPPC/300 page 20, lines 5-23.

[47] PGE/701, page 16, line 10 – page 17, line 1.

condition, arguing instead that that Condition 6 "seems to contradict Condition 5"[48] as a result a semantic discussion of the meaning of the term "sufficiently differentiated."[49] This attempt to use Condition 5 to undermine Condition 6 should be given no merit - Condition 6 is of fundamental importance to ensuring any VRET program is in the public interest.

D. The Commission Should Expressly Limit Utility Ownership of VRET Generation Resources

The Commission should reject proposals to change Condition 7 and deny PGE's request that it be permitted to include a VRET asset in its rate base. The limitations on utility ownership included in Condition 7 was one of the fundamental protections the Commission included before finding a potential VRET could be in the public interest. There have be no fundamental changes in the power markets in the Pacific Northwest that reduce the need for such protections.[50]

a. Limitation on utility ownership of a VERT resource is necessary to protect competition.

PGE is now essentially proposing an elimination of Condition 7, and seeking permission to own a VRET resource and include that resource in rate base. PGE makes it clear that "ownership is very important to us."[51] And PGE is not simply seeking ownership of a VRET resource: PGE is also seeking waiver of the of the competitive bidding guidelines, the ability to earn a return on the asset *and* a risk adjustment for potential downside risk *and* the opportunity to profit from upside risk. PGE's actions in this docket show the need for the protections engrained in the Nine Conditions.

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[48] PGE/800, p. 13, line 12.

[49] PGE/800, p. 13, lines 18-20.

[50] *See* NIPPC/300 at 24 "there have been no fundamental changes to power markets in the Pacific Northwest or Oregon that would fundamentally change the concerns regarding utility ownership. The local utilities in Oregon maintain their status as monopoly service providers with respect to distribution, and largely with respect to sales of power. The number of ESS providers competing with the utilities have not significantly changed. The limitations on the terms and conditions under which an ESS can provide competitive service to potential customers have not significantly changed, other than to the extent that Direct Access offerings for some utilities are now essentially "capped out" from offering additional service. In short, nothing has changed that would warrant revisiting the Commission's determination on this issue)."

[51] PGE/800 p. 46, line 6; TR p. 66, line 6.

PGE supports its proposal to modify Condition 7 by suggesting that "the heart of this prohibition … is the concern against cost shifting."[52] That is plainly untrue – the heart of the prohibition is the concern on the impacts to competition. In the Staff Memo to the Commission adopted in the VRET proceeding, Staff found that "[o]f the range of VRET models considered, Staff identified *utility ownership of VRET resources to have the most potential for impacts to competitive markets for VRET resource development*,[53] and Staff recommended that "the regulated utility should *not be permitted* to own a VRET resource."[54] Staff's analysis of the issue is detailed. Among other things, Staff noted that Oregon utilities are monopolies, and that "[a] monopoly's participation in a VRET market would reduce and possibly eliminate the competitive nature of such a market due to these aforementioned advantages being unavailable to potential producers."[55] Staff noted further that "[a] utility would be able to absorb the failure of a generation asset (a failed market entry) through means afforded to it by way of its regulated status and recognition of its public benefit, whereas a third party or customer would not necessarily have such loss-mitigating means available to them. Barriers like this introduce additional risk to participants interested in participating in a market where utilities are permitted to operate; this particular risk is detrimental to the competitive aspects of a market."[56] Staff concluded that a utility participating in a VRET market "may further inhibit competitiveness due to a utility's horizontal market power"[57] – which the Commission is expressly required to mitigate under statute; and that even if utility ownership of VRET resources could produce a short-term rate savings to customers, "[i]n the long term, such a scenario ultimately produces harm to the market in the form of fewer participants, riskier signals to investors, and subsequent higher prices.[58] Staff's testimony in the current proceeding continues to note its concern that

[52] PGE/800, p. 22 lines 9-12.

[53] Order No. 15-405Appendix A, P. 9 (emphasis supplied).

[54] Id. (emphasis supplied).

[55] Id., P. 12.

[56] Id., P. 12.

[57] Id., P. 12.

[58] Id., P. 13.

utility ownership could result in "an unfair competitive advantage" that is not related to cost shifting.[59]

Ultimately, the Commission did not mandate a complete prohibition on allowing utilities to own a VRET resource, but did something of similar effect: the Commission expressly prohibited a utility from including a VRET resource within its rate base, and further required that, to the extent a utility did desire to own a VRET asset, it would be required to share some of the return it receives from such ownership with other utility customers for ratepayer-funded assets used to assist the VRET offering. By refusing to allow a utility to include a VRET in rate base, and requiring a sharing of revenue, the Commission effectively eliminated the competitive advantage the utility would otherwise gain from owning a VRET resource. In addition, by ensuring that a utility did not include a VRET in rate base, the Commission essentially required that any utility ownership be undertaken through an affiliate, which would require the utility to follow a variety of regulatory requirements designed to ensure separation of functions and eliminate cost shifting, such as a requirement to maintain separate books and records and account for marketing costs separately.

PGE's original proposal in this docket (as initially filed at Docket UM 1690) specified that "PGE is proposing to structure its initial green tariff offering through PPA(s) with a third-party,"[60] but also indicated that PGE "may consider future ownership of a green tariff resource."[61] PGE now discloses that ownership of a VRET resource is a driving goal; "ownership is very important to us,"[62] "absolutely."[63] The concerns raised by Staff that allowing PGE to include a VRET within its rate base would create "an unfair competitive advantage" and

[59] Staff/400, page 23

[60] UM 1690, PGE/200, Sims-Tinker/8, lines 1-2

[61] UM 1690, PGE/200, Sims-Tinker/9, lines 3-4.

[62] PGE/800 p. 46, line 6; TR p. 66, line 6

[63] Tr. 66, line 6, line 16

"may further inhibit competitiveness due to a utility's horizontal market power"[64] have not been mitigated at all, and this protection should continue.

It is also important to note that not allowing a utility to include a VRET in rate base does not in any way limit the number of competitors able to bring low-carbon power generation into the Oregon market. PGE remains free to have an affiliate form an ESS if it desires to provide the type of services that Direct Access allows for.[65] But PGE should not be given the incentive to further lock out competition through a guaranteed return on top of the risk premiums that it already has proposed for this program.[66]

b. Inclusion of a VRET Resource in PGE's rate base will create an over-recovery of costs.

The Commission also should recognize that allowing a utility to include a VRET asset in rate base as proposed by PGE would create a double-recovery of costs. PGE acknowledges that the return on equity it receives for plants in rate base includes a component to compensate shareholders for their risk.[67] PGE also is seeking an additional risk premium, over and above the level it receives for plants in rate base, to further compensate shareholders from certain risks inherent in the VRET program.[68] To the extent these risks do not occur, or to the extent that PGE has the opportunity to profit from sale of excess energy acquired from the VRET program, PGE shareholders will retain the excess revenue. PGE should not be entitled to a return on equity (which includes a component to compensate for risk), and a risk premium that removes all downside program risk from PGE's shareholders, *and* the opportunity to profit further from sale of excess energy – doing so would constitute an over recovery and is inconsistent with Oregon's utility paradigm.

[64] Id., p. 12.

[65] Tr page. 10, lines 10-14.

[66] Tr. p. 22.

[67] Tr. p. 40.

[68] PGE/800 p. 37, line 17.

E. The Protections of Condition 8 (No Cost Shifting) must be maintained and the Commission should take further action to ensure cost shifting does not occur.

Condition 8 specifies that a VRET may not result in cost shifting, and specifically references the fact that such costs in question "include but are not limited to ancillary services and stranded costs of the existing cost of service rate-based system."[69] PGE seeks to modify this provision, expressly deleting the final sentence, including reference in Condition 8 to "stranded costs," and argues that "stranded costs of the existing system should not be borne by VRET customers"[70] and that no stranded costs can result from its VRET program.[71] NIPPC urges the Commission to maintain and/or strengthen the existing language with respect to stranded costs, as well as evaluate whether further action is needed to ensure PGE does not engage in inadvertent cost shifting.

a. *The Commission should expressly prevent PGE from including in Direct Access transition charges costs related to excess capacity created by the VRET program.*

Currently, the utilities are entitled to recover from customers that elect to take Direct Access service a transition charge for "stranded costs" to recover costs for a share of the capacity that the utility purchased prior to the Direct Access customer leaving the system. If PGE acquires additional capacity to provide service for the VRET program, it could inflate the level of capacity owned by, or under contract to, PGE.[72] To the extent PGE acquires capacity for its VRET program, it must not only ensure that such VRET capacity is not included in the transition costs calculation, but also debit an equivalent amount of capacity from the transition cost calculation – capacity that for all practical purposes has been replaced by the VRET

[69] "All direct and indirect costs and risks are borne by the participating voluntary renewable energy customers, shareholders of the utility or third party developers and suppliers with provisions allowing independent review and verification by Commission Staff of all utility costs. Costs include but are not limited to ancillary services and stranded costs of the existing cost of service rate-based system." Order 19-075. page 3.

[70] PGE/800 at p. 29.

[71] PGE/701, Wenzel-Halley/27, lines 13-21.

[72] NIPPC/300 at p. 21.

capacity, under a voluntary program, should not be the responsibility of customers that have elected to leave PGE's cost of service.[73] The current language of Condition 8 expressly references "stranded costs" and should be maintained. Whether or not the Commission retains this language, it should expressly clarify its policy to ensure this type of cost shifting does not occur.

b. *The Commission should evaluate whether further action is needed to ensure PGE does not engage in cost shifting*.

The record in this case makes it clear that PGE drew on system resources to subsidize its VRET program without fully accounting for such resources. This creates an unfair market advantage for PGE's GEAR program as compared to competitive alternatives.

For example, PGE did not assign any new customer representatives to work with customers regarding the GEAR program.[74] PGE did not allocate any costs to the program at all prior to March 25, 2019.[75] PGE did not allocate legal costs to the program, despite acknowledging such costs were incurred for negotiation of the PPA and other program aspects, first suggesting that no legal costs are incremental to the GEAR, and that "these costs represent regular ongoing activity that is recovered in base rates,"[76] and then subsequently suggesting that such costs are captured through a generic corporate allocation intended to cover an employee's time when it is "onerous to code" because of short durations.[77]

NIPPC does not mean to imply that PGE has intentionally engaged in cost-shifting; but submits that some level of subsidization clearly has occurred. This is inappropriate both from the standpoint of general system customers that are subsidizing a program that they have not elected (or don't qualify) to pursue as well as from the standpoint of competitive services. The

[73] NIPPC/300 at 21-22.

[74] Calpine Solutions/202 – Supplemental Hearing Exhibit/3.

[75] Tr. 95 line 10.

[76] Calpine Solutions/202 – Supplemental Hearing Exhibit/3.

[77] Tr. P. 65 line 10.

Commission should take appropriate steps to ensure that PGE maintains rigorous accounting systems and does not allow for any further costs shifting.

F. PGE's request for a generic waiver of competitive bidding rules must be rejected.

PGE seeks a waiver of the competitive bidding rules for acquisition of a VRET asset – including assets to be owned by PGE. There is no basis to pre-approve a waiver of the Commission's competitive bidding rules.

The Commission has already found that the competitive bidding rules apply to VRET assets.[78] For Phase I of PGE's GEAR program, the Commission granted PGE's request for a waiver of the CBRs, noting specifically that PGE had "recently completed an RFP process" and was likely in a position to identify a resource on an expedited basis."[79] NIPPC did not oppose such treatment, nor does it anticipate opposing such treatment in the future for acquisition by PGE of a VRET resource through a PPA (without an ownership acquisition right) – provided PGE can again show that it has *reasonably current market knowledge* as a result of a recent IRP or similar event, and has an actual need for expedited treatment.

By contrast, NIPPC strongly opposes *pregranting* PGE a waiver of the competitive bidding rules, especially any waiver of the competitive bidding rules in circumstances where PGE intends to own (or has a contractual right to acquire) the VRET asset. PGE has testified that it has performed no analysis of prospective assets for the next phase of its GEAR program, nor does it have any estimate of customer demand.[80] PGE does not know when, or if, it will move forward with the next phase of its GEAR program. PGE asserts that the energy market in Oregon has changed dramatically in the past 4 years,[81] yet at the same time PGE testifies that information garnered from an IRP that took place four years

[78] See OPUC Order 19-213 (2019).

[79] See OPUC Order 19-213 (2019), Appendix A page 8.

[80] Tr. 69, line 14 (acknowledging that PGE has not "calculated or analyze the demands of the GEAR program."

[81] PGE/800 pages 9-10.

ago would still be sufficiently timely for it to rely on for selecting a renewable resource.[82] These two contradictory positions demonstrate why a pregranted waiver is simply not appropriate. Given the pace of change of renewable technology, data from IRPs held in past years may not be sufficient. NIPPC does not oppose PGE requesting a waiver at such time as it desires to move forward, to the extent PGE can demonstrate it has current information, but a pre-grant of such authority is simply not appropriate.

PGE's request for a waiver of the CBRs is particularly troublesome given PGE's clear intent to own a VRET resource. As described above, PGE has testified that ownership of a VRET resource "is very important to us." To the extent the Commission modifies Condition 7, no waiver of the CBRs would be appropriate.

PGE's request for a waiver of the CBRs is also inappropriate because PGE retains monopsony market power in negotiations with prospective renewable power developers, and can artificially limit competition among potential power suppliers. Absent a CBR, nothing prevents PGE from extracting special terms from a prospective developer, such as a requirement that the developer agree in advance to sell the asset to PGE in the future or similar proposals that PGE may believe are in its own best interest, but not necessarily in the best interest of either its customers or the competitive marketplace. For example, the record reflect that [**START HIGHLY CONFIDENTIAL MATERIAL**]

[82] Tr. Page 83, line 11.

[83] Tr.

[84] Tr.

[85] NIPPC/418

[86] NIPPC/418

[redacted][redacted][87] [**END HIGHLY CONFIDENTIAL MATERIAL**] The individual nature of the negotiations for a VRET resource, and the potential for inclusion of terms not otherwise made available to the market and/or which allow PGE to extract favorable treatment make it clear that pre-granting waiver of the CBR is not appropriate.

IV. CONCLUSION

NIPPC respectfully requests the Commission make the following findings and take specific actions in this proceeding as summarized below and as more fully described above:

(1) The Commission should find that changes to the Pacific Northwest power markets in recent years do not fundamentally modify the competitive conditions in the region or justify eliminating the program design protections included in the original VRET program.

(2) The Commission should find that, in crucial respects, Direct Access and the VRET are directly competing programs, each of which can support decarbonization of the electric grid in Oregon.

(3) The Commission should reject contentions made by PGE and others that the VRET and Direct Access Programs are for "distinctly different customers"[88] even in cases when a utility offers service based on a "cost of service" rider or otherwise.

(4) The Commission should retain the protections of Mirror Condition 6. To the extent the Commission believes that a modification of the Mirror Condition with respect to a specific VRET program (such as PGE's GEAR program) is appropriate, the Commission should only do so by granting limited waiver on a case-by-case basis, and only to the extent the utility is able to show, with express evidentiary support, that: (a) a given term or condition of service *cannot reasonably be implemented under Direct Access*; (b) the utility has presented a *compelling rationale for why different terms and conditions are necessary* for the program to function; and (c) the different treatment does *not create barriers to the competitive market*, such as creating a category of customer that is eligible for service under the VRET but ineligible to receive service under Direct Access.

[87] Tr. [redacted]

[88] *See, e.g.*, PGE/500 Page 21, lines 14-23; PGE/700, Wenzel-Haley/11, lines 7-9.

(5) The Commission should expressly reject PGE's proposal that it be allowed to include a VRET resource in its rate base.

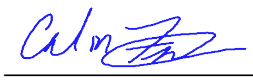
(6) The Commission should clarify that PGE may not recover costs of excess capacity resulting from the VRET program through transition charges that imposed on its Direct Access program.

(7) PGE's request for a generic waiver of competitive bidding rules must be rejected.

(8) PGE's Risk Premium Proposal Allows for Double Recovery of Costs and should be modified.

Dated this third day of November, 2020.

Respectfully submitted,



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