BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UM 1953

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

Pursuant to the procedural schedule adopted by the Commission in this Docket, the Northwest and Intermountain Power Producers Coalition ("**NIPPC**") submits this closing brief for Phase II of the Commission's Investigation into Portland General Electric Company's ("**PGE**") voluntary renewable energy tariff ("**VRET**"). This closing brief responds to certain arguments raised in opening briefs filed in this docket on November 3, 2020, by Portland General Electric Company ("**PGE**"), PacifiCorp d/b/a Pacific Power ("**PacifiCorp**"), Oregon Citizens' Utility Board ("**CUB**"), and Staff of the Public Utility Commission of Oregon ("**Staff**").[1]

NIPPC will not reiterate here the litany of arguments regarding the interaction between VRET programs and Direct Access that have now been addressed in many rounds of testimony, workshops, pleadings and hearings, in this docket as well as related dockets, such as UM 2024.[2] Instead, we focus on just a few salient points, and urge the Commission to take a pragmatic approach that is consistent with Oregon law and policy. NIPPC respectfully requests that the Commission take the following approach in this docket:

(1) The Commission should expressly reject contentions made by PGE and others that the VRET and Direct Access Programs are for "distinctly different customers"[3] even in cases when a utility offers service based on a "cost of service" rider. Such contentions are not factually accurate.

[1] Briefs were also filed by Walmart, Renewable NW, Calpine Energy Solutions, LLC, and the Alliance of Western Energy Consumers.
[2] Petition for Investigation into Long-Term Direct Access Programs, Docket UM 2024.
[3] *See, e.g.,* PGE/500 Page 21, lines 14-23; PGE/700, Wenzel-Haley/11, lines 7-9.

(2) The Commission should retain the protections of Mirror Condition 6. To the extent the Commission believes that modifying the application 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 of the Mirror Condition 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.

NIPPC submits that no party has provided any rational basis why this proposal is not a simple and effective solution that preserves the utilities' ability to create and offer VRET services desired by the market while also protecting the retail market as required by Oregon law.

(3) The Commission should expressly reject PGE's proposal that it be allowed to include a VRET resource in its rate base. Allowing utilities to place VRET resources into their rate base, guaranteeing them cost recovery with an opportunity earn a return on the investment will *not* increase the availability of renewable resources, but will create incentives for cost-shifting and inhibit market participation by others.

(4) The Commission should expressly clarify that PGE may not recover costs of excess capacity or other Uneconomic Utility Investments[4] resulting from the VRET program through transition charges that are imposed on its Direct Access program.

(5) PGE's request for a generic waiver of competitive bidding rules must be rejected. With respect to this last point, NIPPC does not oppose Staff's recommendation for a modified Competitive Bidding Rules (CBR) where appropriate.

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[4] *See* 860-038-0005(71) "(71) "Uneconomic utility investment" means all Oregon allocated investments made by an electric company that offers direct access under ORS 757.600 to 757.667, including plants and equipment and contractual or other legal obligations, properly dedicated to generation, conservation and work-force commitments, that were prudent at the time the obligations were assumed but the full costs of which are no longer recoverable as a direct result of 757.600 to 757.667, absent transition charges. "Uneconomic utility investment" does not include costs or expenses disallowed by the Commission in a prudence review or other proceeding, to the extent of such disallowance and does not include fines or penalties as authorized by state or federal law."

NIPPC understands that there are competing policies at stake in this docket, but submits that an appropriate outcome under Oregon law is clear: The Commission has an obligation to look after the public interest, which includes ensuring that it develops policies to enhance the competitive market and reduce utility monopoly power.[5] Oregon is also moving forward to reduce the carbon density of its power grid.[6] These policies can best be accomplished by allowing Phase II of PGE's VRET to go forward, while also retaining the essential market protections necessary to ensure the program does not undermine growth of the competitive market, which is also equipped to (and in fact does) provide innovative and cost effective carbon reducing solutions for customers when given the opportunity to compete. In short, PGE should be allowed to offer a second phase of its VRET, but not in a manner that it allows PGE to offer such service under terms and conditions more favorable than can be offered under Direct Access.

With respect to some of the arguments raised by parties in Opening Briefs, NIPPC Offers the following specific responses and clarifications:

1. Arguments to Delete the Mirror Condition are Unfounded.

Condition 6, also known as the "Mirror Condition" provides that a utility can propose terms and conditions under a VRET that differ from those in its Direct Access program, but if it does, it must "propose changes to their respective direct access programs to match those changes."[7] In other words, the Mirror Condition places no limits on what a utility can offer under a VRET, provided it maintains a fair playing field with Direct Access. As Staff notes in its brief, "Staff finds Condition 6 to be necessary to finding a VRET to be in the public interest, as the Oregon legislature made it clear that the protection of the competitive energy retail market is a duty of the Commission."[8] NIPPC agrees with this statement.

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[5] ORS 757.646(1).
[6] 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.
[7] Order No. 15-405, Condition 6.
[8] Staff Opening Brief at P. 11.

NIPPC does not dispute that there may be circumstances in which requiring a utility to fully "mirror" its VRET and Direct Access programs would not be appropriate, and has offered a simple and straightforward three-step approach to identify those situations and allow for waiver where appropriate: Where (1) the utility can show that 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) 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. Staff offers a similar approach, requiring utilities to justify any differences between terms and conditions of a VRET and Direct Access offerings.[9] NIPPC understands that the utilities may not prefer this solution, and would prefer the unfettered discretion to offer a VRET untethered to competitive concerns, but it ***is worth noting that no party has provided a reason why this type of solution is not workable***.

PGE, PacifiCorp, and CUB, by contrast, offer various rationales as to why they believe Condition 6 is no longer necessary at all, but these reasons don't withstand scrutiny. One argument raised by PGE in an effort to have the mirror condition removed is that, through strict application of the mirror condition, a regulated utility could further limit, as oppose to improve, its Direct Access offerings.[10] This argument has no merit: The Mirror Condition never obligated the two programs to be precisely identical, just that a utility be required to propose changes as may be necessary to protect competition. PGE could, and in fact often does, propose limits and conditions on its Direct Access program for the Commission's consideration, without regard to whether it also is offering a VRET service. An ESS or Direct Access customer, by contrast, has very limited ability to pursue a change to PGE's tariff, and is beholden to the utility to propose any change for

[9] Staff Opening Brief at p. 12.

[10] PGE Opening Brief at p. 8 ("Additionally, Condition 6 adversely limits VRETs and will potentially thwart the Commission's objective to limit the impact to the competitive market if the regulated utility, through strict application of Condition 6, can significantly lower the cap of its DA program to match the VRET program cap.")

Commission consideration. *That* is what the mirror condition addresses: it requires PGE to at least bring forth a proposed change for consideration by the Commission to keep the programs on a level playing field. The Mirror Condition simply places an affirmative duty on the utility to propose corresponding changes, and is intended to protect competition, not hinder it.

PGE's suggestions that the Mirror Condition would require it to forego offering VRET service to classes of customers, rather than offer such service and also propose modifications to its Direct Access program, shows the fallacy of its position: The Mirror Condition, properly applied, would create more opportunities for customers to acquire renewable power, not less. The fact that PGE has failed to articulate any basis whatsoever as to why it cannot offer its VRET and Direct Access services under reasonably similar terms demonstrates the fallacy of its proposal.

Rather than address the comparability of service issue directly, PGE, PacifiCorp and CUB offer various suggestions in an effort to distinguish the programs, but their arguments are unsupported. For example, each suggest that the protections of Condition 6 and other provisions are not necessary to the extent a VRET is based on a "cost of service" program.[11] PGE further proposes that condition 6 – even as a limited guideline, should only apply to a VRET "outside of or in lieu of cost of service."[12] Against all evidence, PacifiCorp continues to maintain that these programs do not compete,[13] when they clearly do -- even CUB acknowledges that "a customer can undoubtedly face a choice between a VRET program and DA to meet its needs," [14] and can and does add new, physical renewable resources to the system.[15]

As more fully addressed in NIPPC's opening brief, the record in this proceeding makes it clear that PGE's VRET and Direct Access directly compete for some of the same customers, and

[11] *See, e.g.,* PGE at Opening Brief at p. 15 ("If the Commission should determine that some form of Condition 6 should be maintained, then PGE recommends modifying the condition to apply if a utility offers a design other than one that is a COS rider as a basis to participate in the VRET.") _
[12] *See* PGE Opening Brief at p. 15.
[13] PacifiCorp Opening Brief at p. 1.
[14] CUB Opening Brief at p. 11.
[15] CUB Opening Brief at p. 11.

the fact that PGE's program starts with a cost of service basis does not change this fact. In this instance, it is a distinction without a difference.

In urging the Commission to remove market protections embedded in the nine conditions, CUB argues that "the public interest is not served by protecting the profitability of for-profit independent power producers."[16] CUBS main issue appears to be its concern with Direct Access in general – issues that are before the Commission in other dockets, such as UM 2024. CUB's public interest concern misses the mark. NIPPC is not seeking "protection" for the profitability of for-profit independent power producers, it is simply seeking a chance to compete. NIPPC's goals in this docket are fully consistent with the public interest as identified by the legislature and Oregon law: 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."[17] *That* is the public interest the Commission must protect. Policies that limit development of the competitive retail market – such as allowing a utility to offer a VRET under terms and conditions more favorable than the limitations that PGE asserts are necessary in its Direct Access tariffs, and policies that increase, rather than decrease, the incumbent utility's horizontal and vertical market power – such as allowing a utility to add VRET capacity to rate base -- are inconsistent with the public interest and the law of the state.

No party has articulated how the "public interest" is served by allowing PGE to offer services from which competing power suppliers are barred from offering. Such actions may be in the interest of the utility itself, but not necessarily in the public interest. Simply repeating the mantra that PGE's VRET is a "cost of service" program does nothing to change that fact.

2. Arguments to Allow PGE to include a VRET Resource in Rate Base should be Rejected.

PGE urges that it be allowed to own a VRET resource and include it in rate base, and has telegraphed that it has full intention of doing so.[18] Allowing utility ownership of a VRET

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[16] CUB Opening Brief at p. 5.
[17] ORS 757.646(1).
[18] PGE Opening Brief at p. 18.

resource will *not* increase the number of customers desiring to take such service, and will *not* decrease the number of competitors that could develop a renewable energy project to serve such customers[19] – it would simply undermine competition. The Oregon legislature has found that competition, and reduction of utility monopoly power, is in the public interest.

Whether or not PGE is permitted to own a VRET resource and include it in rate base, NIPPC shares the concern raised by Staff that PGE is attempting to create the equivalent of a "special contract" program that should not be permitted. PGE has indicated it intends to own a VRET resource, seeks waiver of the traditional CBR requirements, and desires an accelerated timeline for program expansion. As Staff notes, scrutiny for utility-owned resources is particularly important because the resource could be built for a single customer's demand, making the risk of losing the customer or some of the customer's demand more impactful. PGE's proposed GEAR structure could effectively turn the GEAR program into a special contract program with minimal oversight from the Commission, in which PGE acquires a preferred renewable resource to serve a single, selected large customer, with minimal Commission oversite.

3. 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.

[19] PGE remains free to form an affiliate to construct and operate renewable resources to sell into the VRET program and/or through Direct Access. As Staff notes, concerns regarding cost-shifting and the implications for COS customers are diminished when the utility elects to use an affiliate or treat the resource as below-the-line, rather than include such resource in rate base, but nevertheless are not non-existent, given the interrelated nature of utility risk and the financial health of the utility. Nonetheless it remains a viable option for the utility to pursue.

(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"[20] even in cases when a utility offers service based on a "cost of service" rider.

(4) The Commission should retain the protections of Mirror Condition 6. To the extent the Commission believes that modifying the application 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.

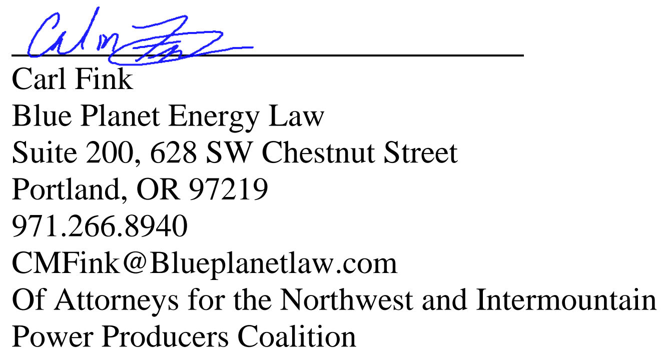
(5) The Commission should expressly reject PGE's proposal that it be allowed to include a VRET resource in its rate base.

(6) The Commission should clarify that PGE may not recover costs of excess capacity or other Uneconomic Utility Investments 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 13 day of November, 2020. Respectfully submitted,



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